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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

346 U. S.
ONE-PO
59

No. 166

ONEIDA LTD.,

Petitioner,

v.

GRAYSON-ROBINSON STORES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA AND BRIEF IN SUPPORT THEREOF

WALLACE H. MARTIN,
WALTER J. HALLIDAY,
ROBERT B. TROUTMAN,
JAMES M. SIBLEY,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I. Statement of the Matter Involved

A. Nature and basis of the proceedings.

This case involves a repudiation of the power of Congress to remove Federal barriers to existing State statutes and to effectuate public policies of the States.

Georgia is one of forty-five states which have enacted the uniform fair trade law authorizing the owner of a trade-mark to enter into contracts with retailers, known as "fair trade contracts", to establish the minimum prices

at which goods shall be sold under the trade-mark.[1] These fair trade laws also contain what is commonly referred to as a "non-signer provision," condemning as unfair competition the sale of goods under the trade-mark at prices below those thus established, even when such sales are made by one who has not signed a fair trade contract. Other provisions of the fair trade laws, as uniformly adopted, such as, for example, the restriction of its application to commodities in free and open competition with commodities of the same general class produced or distributed by others, are not pertinent here.

The Georgia Fair Trade Act has been in effect since March 4, 1937 (App. B, p. A10, *infra*). On August 17, 1937, Congress passed the Miller-Tydings Act, which amended the Sherman Act[2] by exempting from the prohibitions of the Sherman Act fair trade contracts which are lawful as applied to intrastate transactions "under any statute, law or public policy now or hereafter in effect in any State * * *" (App. C, p. A14).

The declared sole objective of the Miller-Tydings Act was "to permit the public policy of States having 'fair trade acts' to operate with respect to interstate contracts for the resale of goods within those States," and thus "to help effectuate a public policy so fixed in a State."[3]

At the time when the Miller-Tydings Amendment was enacted, forty-two states had fair trade acts (App. G, pp. A35-A37), each containing a "non-signer provision," but on May 21, 1951, this Court held that the Miller-Tydings

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[1] A list of the State Fair Trade Acts, with the dates when each was originally enacted or approved, is printed as Appendix G, p. A35.

[2] Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. Sec. 1.

[3] House Report, No. 382, 75th Congress, 1st Session. Extracts from the House and Senate Reports are printed as Appendix E at pp. A18-A24. The statements quoted above appear on pp. A18 and A20.

Amendment did not extend to "non-signers".[4] On July 14, 1952, Congress disclaimed this limitation of the scope of the Miller-Tydings Amendment, and undertook to nullify it, by passing the McGuire Act (App. D, pp. A15-A17). Under the McGuire Amendment[5] the exemptions from the prohibitions of the Sherman Act are extended to rights under non-signer provisions. It specifies that nothing contained in the Anti-Trust Acts shall render unlawful "the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity" at less than the price prescribed in a fair trade contract "is unfair competition and is actionable at the suit of any person damaged thereby" (App. D, p. A16). The express purpose of the McGuire Amendment was to overcome the effect of this Court's limiting construction of the Miller-Tydings Amendment.[6] This Court has in all instances given effect to such congressional judgments contradicting its own previous one.[7]

B. The parties and the proceedings below.

The facts are not in dispute. Respondent operates a retail store in Atlanta, Georgia. Petitioner, owner of the trade-mark "Community", used on plated silverware which petitioner manufactures in New York, entered into contracts with retailers in Georgia establishing fair trade prices as provided by the Georgia Fair Trade Act. Respondent, with notice of the fair trade prices thus estab-

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[4] *Schwegmann* v. *Calvert Corp.*, 341 U. S. 384 (1951).

[5] The McGuire Act was passed as an amendment to the Federal Trade Commission Act. 66 Stat. 632, 15 U. S. C. Sec. 45. In effect it also amends the Sherman Act.

[6] House Report No. 1437 and Senate Report No. 1741, 82nd Congress, 2nd Session. Extracts from these reports are printed as Appendix F at pp. A25-A34.

[7] *Prudential* v. *Benjamin*, 328 U. S. 408, 424 (1946).

lished under the Georgia Fair Trade Act for silverware bearing the "Community" trade-mark, willfully advertises and sells such silverware, which it purchases from sources other than petitioner, at prices below the established fair trade prices. Respondent's sales of "Community" silverware are "loss leader" sales (App. A, p. A2). They constitute actionable unfair competition under the Georgia Fair Trade Act (App. B, p. A13).

Petitioner brought suit in the Superior Court of Fulton County, Georgia, for an injunction against the continuance of respondent's unfair competition (R. pp. 5-9). Respondent demurred, generally, on the ground that the Georgia Fair Trade Act is null and void (R. pp. 16-19). The demurrer was overruled (R. p. 27).[7a]

The Supreme Court of Georgia reversed the judgment. It held that the Georgia Fair Trade Act is null and void because (1) it was contrary to and inconsistent with the terms of the Sherman Act before its amendment by the Miller-Tydings and McGuire Acts, and, (2) having been enacted prior to these amendments of the Sherman Act, the Georgia Fair Trade Act could not become valid except by re-enactment. Petitioner's suit was therefore held subject to general demurrer (App. A, pp. A5, A8).

C. The Opinion of the Supreme Court of Georgia.

The Opinion below,[8] after acknowledging the supremacy of federal law under the Federal and State Constitutions, discusses the Sherman Act as it was prior to its amendment, and the then-existing conflicts of the fair trade laws with the Sherman Act, and quotes from the Miller-Tydings and McGuire Amendments. The Court then states its conclusion and the basis for its judgment, thus:

[7a] Special demurrers (R. pp. 19-26) also were overruled, but the judgment sought to be reviewed is on the general demurrer only.

[8] *Grayson-Robinson Stores, Inc.* v. *Oneida Ltd.*, 75 S. E. (2d) 161. The Opinion is also printed as Appendix A, at pp. A1-A9, *infra*.

"So we accordingly agree that the provisions of Georgia's fair trade act are not prohibited by the Sherman Act as amended by the Miller-Tydings Act and by the McGuire Act; but we do not agree to the contention that Georgia's fair trade act became valid, without re-enactment, after the Sherman Act was thus amended" (App. A, p. A5).

The Georgia Court thus construes the Miller-Tydings and McGuire Acts so as to make ineffectual, so far as Georgia is concerned, the provisions in these acts which give Congressional support to statutes, laws, and public policies "now" in effect in any State.

II. Jurisdictional Statement

A. The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 929 [28 U. S. C. Sec. 1257(3)].

B. The judgment sought to be reviewed is based upon the conclusion of the Supreme Court of Georgia that the Georgia Fair Trade Act [9] is null and void on the ground that when enacted and approved it was repugnant to the Sherman Act [10] and, consequently, to the commerce clause of the United States Constitution [11] and on the further ground that the Miller-Tydings Amendment [12] and the

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[9] Act No. 100 of the General Assembly of Georgia (1937), approved March 4, 1937; Georgia Laws of 1937, p. 800; Georgia Code, 1933, Ann., Sec. 106-407.

The Georgia Fair Trade Act is set out verbatim as Appendix B at pp. A10-A13 and pertinent provisions are summarized above (pp. 1-2).

[10] Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. Sec. 1.

[11] Art. 1 Sec. 8, clause 3.

[12] 50 Stat. 693, 15 U. S. C. Sec. 1; printed as Appendix C at p. A14.

McGuire Amendment,[13] which were enacted to give support to statutes such as the Georgia Fair Trade Act, and which amended the Sherman Act by exempting from its prohibitions such statutes then in effect in any State, were not effective to give validity to Georgia's fair trade act.

The statute under which jurisdiction is invoked, and which provides for review by writ of certiorari to a State court where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution or laws of the United States, governs not only where the State court has sustained a State statute but also where the State court has invalidated a State statute. *Voeller* v. *Neilston,* 311 U. S. 531 (1941); *Nelson* v. *Sears, Roebuck & Co.,* 312 U. S. 359 (1941); *Minnesota* v. *National Tea Co.,* 309 U. S. 551 (1940); *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 120 (1924).

C. The judgment sought to be reviewed was entered on February 24, 1953 (R. p. 27) and a motion for rehearing of such judgment was denied on March 10, 1953 (R. p. 42). The time for filing this petition for a writ of certiorari, which runs from the date of the denial of the motion for rehearing[14] was, by order of the Chief Justice of the United States, extended to July 7, 1953 (R. p. 44).

D. The Federal question sought to be reviewed was raised in the court of first instance, namely, in the Superior Court of Fulton County, Georgia, by a general demurrer in which respondent urged that the Georgia Fair Trade Act "is of no force and effect and is void in its entirety for at the time of its enactment it was illegal and invalid as being in violation of the Sherman Act * * *, and Congress, by the passage of the Miller-Tydings Act * * * and the McGuire Act * * * could not validate that which was invalid from its inception and the Legislature

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[13] 66 Stat. 632, 15 U. S. C., Sec. 45; printed as Appendix D at pp. A15-A17.

[14] *Leishman* v. *Associated Electric Co.,* 318 U. S. 203, 205 (1943).

of the State of Georgia has not re-enacted the Georgia Fair Trade Act" (R. pp. 16-17). This is also the basis of the judgment of the Supreme Court of Georgia reversing the judgment of the Superior Court and sustaining the demurrer (App. A, pp. A5-A8; and see pp. 22 and 27, *infra*).

E. The Federal question above set forth is adequate and independent and controls the decision of the State Court. The opinion below discusses the Sherman Act and relevant clauses of the United States Constitution in relation to the Georgia Fair Trade Act and, in concluding, attempts to distinguish *In re Rahrer,* 140 U. S. 545 (1891), where this Court held an act of Congress effective in removing obstacles to the enforcement of an existing State law. The ultimate conclusion of the Supreme Court of Georgia is stated thus: "Accordingly, the petition was subject to general demurrer" (App. A, p. A8).

Following this final decision, there is one brief paragraph, in the nature of a postscript, in which the Court says that, "moreover", Georgia's Fair Trade Act offends the due process clause of the Georgia Constitution and is for that reason null and void. The Georgia Constitution is not analyzed in relation to the Georgia Fair Trade Act, nor is it discussed even in general terms. The demurrer (R. pp. 17-18) raised squarely the question of validity under the Georgia Constitution, setting forth at length those same issues of due process and delegation of powers which, in relation to the Federal Constitution, was settled in the *Old Dearborn* case [15] where this Court held that the purpose of a fair trade act is not price regulation but, instead, the protection of property rights in good will, and that such a law does not offend the due process clause. If the Georgia Court had considered this to be a real and substantial question under the Georgia Constitution, it would have taken issue with the reasoning and philosophy of the *Old Dearborn* decision. The Georgia Court does not de-

[15] *Old Dearborn* v. *Seagram,* 299 U. S. 183, 193-194 (1936).

clare its independence of the decision of this Court in the *Old Dearborn* case. The *Old Dearborn* case is not even cited. The one case cited in this connection, a former decision of the Georgia Court,[16] relates to a different State law which it had held unconstitutional under Georgia's due process clause, and there is no quotation from this decision nor any explanation of its relevance.

It is within the province of this Court to inquire whether a non-federal ground set forth in the judgment of a State Court has fair and substantial support. *Ward* v. *Love County,* 253 U. S. 17, 22-23 (1920); *Ancient Egyptian Order* v. *Michaux,* 279 U. S. 737, 745 (1929); *Lawrence* v. *State Tax Commission,* 286 U. S. 276, 282-283 (1932). That a non-federal ground is insubstantial and illusory may appear from the opinion as a whole. *Minnesota* v. *National Tea Co.,* 309 U. S. 551, 554 (1940). This Court does not permit an insubstantial and illusory non-federal question to bar its determination of the validity of State action under the Federal laws and Constitution, or to deprive a litigant of his day in this Court. *Minnesota* v. *National Tea Co., supra,* at p. 557; *Dixon* v. *Duffy,* 342 U. S. 33 (1951); id. 344 U. S. 143 (1952).

Upon contrasting the paragraph of the opinion devoted to the non-federal question with the Court's discussion of the federal question, it becomes apparent that the judgment of the Supreme Court of Georgia rests on its decision of the federal question and that the non-federal question is not substantial. This Court therefore has jurisdiction.

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[16] *Harris* v. *Duncan,* 208 Ga. 561; 67 S. E. (2d) 692 (1951).

III. The Question Presented

Does a State court, in adjudicating a State statute, have authority to deny that Congress has power to validate existing State laws, and does it have authority to make ineffectual the Acts by which, for the declared purpose of helping to effectuate local policies, Congress removed Federal barriers to the enforcement of existing State laws?

More concretely, is the Georgia Fair Trade Act, admittedly not in conflict with the Sherman Act, as amended, rightfully and lawfully adjudicated to be null and void and of no force and effect, merely because it was enacted prior to the Miller-Tydings and McGuire amendments to the Sherman Act, which Congress adopted with knowledge of the existence of the Georgia Fair Trade Act and similar statutes of other States and for the declared purpose of effectuating the State policies incorporated in these then-existing State statutes by giving them broader application and by removing Federal barriers to their enforcement?

IV. Reasons for Allowance of the Writ

1. Congress, in amending the Sherman Act so as to remove barriers to the enforcement of the State fair trade acts, was aware of the then existing State fair trade acts, including the Fair Trade Act of Georgia. The declared purpose of the Miller-Tydings and McGuire amendments to the Sherman Act was to help effectuate the public policies of the States that already had fair trade laws and of the States which might enact such laws in the future (pp. 15-17, *infra*).

This Court has sustained the power of Congress to validate State action in this way and has declared such Congressional action to be an important means of achieving cooperation between the Federal government and the States and of coordinating the exercise of their powers.

Prudential v. *Benjamin*, 328 U. S. 408 (1946); *In re Rahrer*, 140 U. S. 545 (1891). This Court has also held that where problems in the sphere of dual sovereignty are involved, legislation should receive a construction which permits the Federal and State governments to function with the minimum of interference with each other. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523 (1926) (pp. 17-19, infra).

In construing the Miller-Tydings and McGuire Acts as not effective to remove Federal barriers to the enforcement of the Georgia Fair Trade Act and in holding that the Georgia Fair Trade Act therefore is void, the Supreme Court of Georgia has interpreted Federal legislation affecting the laws and policies of nearly all the States, in a way not in accord with the applicable decisions of this Court. *Pope* v. *Atlantic Coast Line Railroad*, 345 U. S. 379, 381 (1953) (pp. 19-26, infra).

2. Until the Supreme Court of Georgia handed down the judgment here sought to be reviewed, the effectiveness of the Miller-Tydings and McGuire Acts in removing Federal barriers to the enforcement of the State fair trade acts, including those already in existence at the time when the Sherman Act was thus amended, had been generally accepted.[17] It had not been questioned even by the two State courts which, in decisions based squarely on the construction of State constitutions, had held that the fair trade laws of their respective states were unconstitutional.[18] The judgment of the Supreme Court of Georgia not only deprives petitioner of the protection for its trade-mark

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[17] *Cal-Dak Co.* v. *Sav-On Drugs, Inc.*, 254 P. (2nd) 497 (Cal. Supr. Ct., 1953); *General Electric* v. *S. Klein on the Square*, 121 N. Y. S. (2d) 37, 44 (1953); *Eli Lilly* v. *Schwegmann*, 109 F. Supp. 269 (E. D. La., 1953); *Elgin* v. *Druxman*, C. C. H. Trade Reg. Rep., 1953 Trade Cases, Par. 67,498 (Wash. Super. Ct., May 4, 1953). Additional decisions based on this assumption are cited in the brief, p. 21, *infra*, footnote 10.

[18] *Liquor Store* v. *Continental Distilling Corp.*, 40 So. 2d, 371 (Fla. Supr. Ct. 1949); *Shakespeare Co.* v. *Lippman's*, 334 Mich. 109; 54 N. W. 2d 268 (1952).

and good will that the State of Georgia, in adopting the Fair Trade Act, intended to provide, but also throws doubt on the fair trade acts of the numerous other States which have seen fit to enact such legislation and whose local policies Congress sought to effectuate (pp. 19-21, infra).

In the *Schwegmann* case [19] this Court impliedly held the Miller-Tydings Amendment, as construed and limited by this Court, to be effective as to statutes already in existence when it was enacted, but did not rule directly on this question. There has been no decision by this Court on any question relating to the McGuire Act. The judgment sought to be reviewed thus rests on the decision of a federal question of substance not heretofore determined by this Court. *Brooklyn Savings Bank* v. *O'Neil,* 324 U. S. 697, 701 (1945).

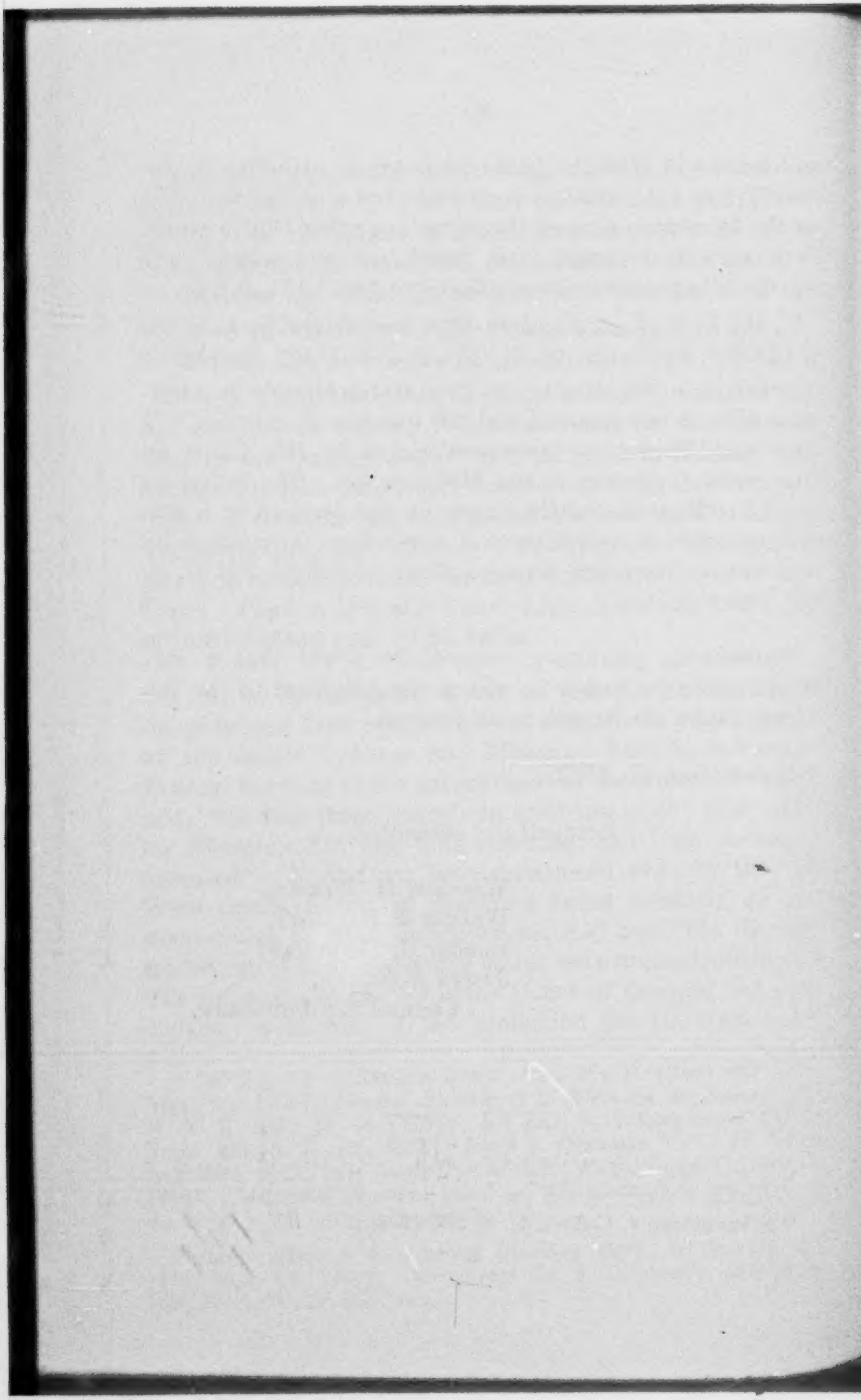
WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Georgia in this action.

Dated, June 25, 1953.

Respectfully submitted,

WALLACE H. MARTIN,
WALTER J. HALLIDAY,
ROBERT B. TROUTMAN,
JAMES M. SIBLEY,
Counsel for Petitioner.

[19] *Schwegmann* v. *Calvert,* U. S. 384 (1951).



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GRAYSON-ROBINSON STORES, INC.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner seeks a review of the final judgment of the Supreme Court of Georgia adjudicating the Georgia Fair Trade Act as invalid under Federal law.[1]

Petitioner sued for protection of its good will under the Georgia Fair Trade Act.[2] It is not disputed that respondent has committed, and threatens to continue to commit the acts complained of, nor is it disputed that these acts of respondent violate the Georgia Fair Trade Act and constitute willfull and deliberate unfair competition, action-

[1] The Opinion below and a concurring opinion are reported at 75 S. E. (2d) 161 and are printed as Appendix A, at pp. A1-A9, infra.

[2] The Georgia Fair Trade Act was enacted and approved on March 4, 1937. It is printed verbatim as Appendix B, at pp. A10-A13.

able under the Georgia Fair Trade Act. The Supreme Court of Georgia nevertheless sustained a demurrer, on the ground that the Georgia Fair Trade Act at the time of its enactment was inconsistent with the Sherman Act and, although since exempted, by Acts of Congress, from the prohibitions of the Sherman Act, remains null and void and of no force or effect whatsoever.

The Court is respectfully referred to the petition for a statement of the matter involved (pp. 1-5, supra), a jurisdictional statement (pp. 5-8, supra), the question presented (p. 9, supra), and the reasons urged for allowance of the writ (pp. 9-11, supra).

I. SUMMARY OF THE ARGUMENT

The power of Congress to effectuate public policies of the States by removing Federal barriers to the application and enforcement of existing State laws, is well established under the decisions of this Court. Exercising this power, Congress enacted the Miller-Tydings and McGuire Amendments to the Sherman Act for the declared purpose of removing Federal obstacles to the enforcement of the State fair trade acts and thus effectuating the public policies of the States, most of which, including Georgia, already had adopted fair trade acts. The Supreme Court of Georgia, in adjudicating the Georgia Fair Trade Act as void under the Sherman Act, failed and refused to recognize that Congress has this power and held, in effect, that the Miller-Tydings and McGuire Acts either were not intended to validate the Georgia Fair Trade Act or else were ineffective for that purpose. This interpretation of these Federal statutes by the Georgia Court, which controls the judgment sought to be reviewed, is in conflict with the declared intention of Congress and with the applicable decisions of this Court. It is this Court, and not the Georgia Court, that should be the final arbiter of the question presented by this petition.

II. ARGUMENT

A. In striking down the Georgia Fair Trade Act the Georgia Court relies on prohibitions of the Sherman Act from which Congress, for the declared purpose of preventing such a result, made the fair trade acts exempt.

1. The Miller-Tydings and McGuire Amendments were enacted for the declared purpose of removing Federal barriers to the application and enforcement of existing State fair trade acts.

The Georgia Court, after quoting from the Miller-Tydings and McGuire Acts, states the reason and grounds for its decision, thus (App. A, p. A5):

> "So we accordingly agree that the provisions of Georgia's fair trade act are not prohibited by the Sherman Act as amended by the Miller-Tydings Act and by the McGuire Act; but we do not agree to the contention that Georgia's fair trade act became valid, without re-enactment, after the Sherman Act was thus amended."

The intention of Congress to make the amendments of the Sherman Act effective as to previously enacted State fair trade acts is plainly stated in the two amending acts. The Miller-Tydings Amendment provided exemption from the prohibitions of the Sherman Act, for contracts or agreements "under any state, law, or public policy *now* or hereafter in effect in any State * * *" (italics supplied) and similar references to State statutes *"now"* in effect were written into the McGuire Amendment (App. C and D, pp. A14, A16).

This intention appears also in the House and Senate reports, extracts from which are printed as Appendices "E" and "F" (pp. A18-A34). The Senate Report on the Miller-Tydings Amendment made note of the fact that the language of the bill "follows closely the language of

the State acts * * * " (App. E, p. A23). The House Committee on the Judiciary, reporting on the Miller-Tydings Amendment said, "The sole objective of this proposed legislation is to permit the public policy of States having 'fair trade acts' to operate with respect to interestate contracts * * * ", and named the States, including Georgia, which already had adopted fair trade acts, and those in which such legislation was then pending. In urging the adoption of the bill, the House Committee said that "sound public policy on the part of the Federal Government lies in the direction of lending assistance to the States to effectuate their own public policy with regard to their internal affairs" and pointed out that "this is especially true where such assistance, as in this instance, consists of removing a handicap * * * " (App. E, pp. A18, A19, A21).

The House Report on the McGuire Amendment, referring to the fair trade laws enacted by 45 States, stated that the bill was "designed to restore the effectiveness of these acts by making it abundantly clear that Congress means to let State fair-trade laws apply in their totality * * * " (App. F, p. A26).

Nowhere in these reports is there any suggestion or intimation that the proposed legislation would be without effect unless and until the State laws were re-enacted.

The intention of Congress in enacting the Miller-Tydings amendment is made plain, also, in the opinions in the *Schwegmann Case*,[3] especially in the dissenting opinion which Congress, by enacting the McGuire amendment, declared to be its own interpretation. The dissenting opinion refers (p. 401) to "the 42 State acts which the Miller-Tydings Amendment was to 'back up'—the acts on which the Miller-Tydings Amendment was to place a 'stamp of approval' * * *," and (p. 400) quotes from the Congressional Record the following statement of Senator Tydings:

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[3] *Schwegmann* v. *Calvert Corp.*, 341 U. S. 384, 397 (1951).

"What we have attempted to do is what 42 States have already written on their statute books. It is simply to back up those acts, that is all; to have a code of fair trade practices written not by a national board such as the N.R.A. but by each State, so that the people may go to the State legislature and correct immediately any abuses that may develop."

2. Congress had the power to remove Federal barriers to the application and enforcement of the fair trade acts which Georgia and other States had previously enacted:

Our constitutional system and the relationship between the Federal and State governments rest on the conviction that each government "must be left free from undue interference by the other." *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523 (1926). This Court has sustained the power of Congress to remove Federal impediments to the enforcement of a State law and has held that when Congress takes such action there is no adequate ground for requiring reenactment of the State law to give it effect. *In re Rahrer,* 140 U. S. 545, 565 (1891); *Butler* v. *Goreley,* 146 U. S. 303, 314 (1892); *Central Pacific Railroad* v. *Nevada,* 162 U. S. 512, 523 (1896); *Prudential* v. *Benjamin,* 328 U. S. 408 (1946).

In the *Prudential Case* the situation was similar in this respect to the situation here, except that in the *Prudential Case* the South Carolina Supreme Court had sustained the affected State statute. This Court affirmed the judgment. South Carolina was one of sixteen States whose tax laws relating to the business of insurance were in existence on the effective date of an Act of Congress which declared that "the continued regulation and taxation by the several States of the business of insurance is in the public interest", and that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * *."[4]

[4] The pertinent sections of the Federal Act involved in *Prudential* v. *Benjamin, supra,* are quoted in the decision, 328 U. S., at p. 429.

This Court, in commenting on the validating act, said (pp. 429-430):

> "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects.
>
> "Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations."

It was then held (pp. 430-431) that the Constitution gives Congress power to validate State laws "by removing obstacles to state action arising from its own action or by consenting to such laws" and that Congress

> "* * * clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for."

In the *Prudential Case* this Court assumed that when Congress adopted the validating act it had knowledge of the then-existing State acts. Here, the House and Senate

reports on the Miller-Tydings and McGuire amendments show, beyond any doubt, that these amendments to the Sherman Act were enacted with knowledge of the then-existing State fair trade acts (p. 16, *supra*). By August 17, 1937, when the Miller-Tydings Amendment was enacted, there were 42 State fair trade laws. When the McGuire Amendment was enacted there were 45 (App. G, pp. A35-A37).

The reasoning, philosophy and law of the *Prudential* decision are applicable here. Congress and Georgia have acted "in complete coordination" to effectuate the fair trade policy of Georgia. "It is therefore reinforced by the exercise of all the power of government residing in our scheme. Clear and gross must be the evil which would nullify such an exertion * * *." (328 U. S. at pp. 435-436.)

3. In striking down the Georgia Fair Trade Act because it was enacted prior to the Miller-Tydings and McGuire Amendments to the Sherman Act, the Georgia Court has decided a Federal question of which this Court should be the arbiter.

With the exception of the judgment sought to be reviewed, the decisions of State courts in fair trade cases arising since the enactment of the Miller-Tydings and McGuire Amendments, either have held or have inferentially assumed that transactions under previously enacted fair trade acts are exempt from the prohibitions of the Sherman Act. After the *Schwegmann* decision [5] and until the McGuire Amendment was enacted, State and Federal courts throughout the country followed this Court's construction of the Miller-Tydings Act, limiting its scope. The McGuire Act has been generally accepted as nullifying the *Schwegmann* decision.

The judicial history of the fair trade acts, reflecting in this way their legislative history, is well illustrated by decisions of the courts of California and Oregon, the first States to adopt fair trade acts. Neither California's nor

[5] *Schwegmann* v. *Calvert*, 341 U. S. 384 (1951).

Oregon's fair trade act has been re-enacted since the Miller-Tydings or since the McGuire Amendment.

In 1936, the California Supreme Court upheld the non-signer provision of the California Fair Trade Act.[6] On August 10, 1951, about three months after the *Schwegmann* decision had been handed down, the Superior Court of California denied an application for an injunction against a "non-signer", holding that under the Sherman Act, the Miller-Tydings Act, *and* the *Schwegmann* decision, the California Fair Trade Act was binding upon both signers and non-signers as to intrastate sales, and upon signers but not upon non-signers as to interstate sales.[7] On April 3, 1952, the decision was affirmed.[7a] On July 14, 1952, Congress enacted the McGuire Amendment, and on March 17, 1953, the Supreme Court of California reversed the decision and remanded the case "for such proceedings as are proper in the light of the 1952 change in the law." [8]

In 1947, the Oregon Supreme Court held a "non-signer" liable under Oregon's fair trade act.[9] At the time when the *Schwegmann* decision was handed down, the Oregon Supreme Court had under advisement another suit against a "non-signer". It ordered reargument and, on the authority of the *Schwegmann Case,* dismissed the action.[9a]

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[6] *Max Factor* v. *Kunsman,* 5 Cal. (2d) 446, 55 P. (2d) 177 (1936).

[7] *Cal-Dak Co.* v. *Sav-On Drugs, Inc.,* 64 Los Angeles Daily Journal, Aug. 1, 1951, p. 1; C. C. H. Trade Reg. Rep., 1950-1951 Trade Cases, Par. 62,904 (Super. Ct. of Cal., County of Los Angeles, July 30, 1951).

[7a] *Cal-Dak Co.* v. *Sav-On Drugs, Inc.,* 242 P. (2d) 333 (Cal. D. Ct. of App., 1952).

[8] *Cal-Dak Co.* v. *Sav-On Drugs, Inc.,* 254 P. (2d) 497, 500 (Cal. Supr. Ct., 1953).

[9] *Borden* v. *Schreder,* 182 Or. 34, 182 P. (2d) 581 (1947).

[9a] *Lambert Pharmacal Co.* v. *Roberts,* 192 Or. 23, 233 P. (2d) 258 (1951).

In a recent decision, the Oregon Circuit Court referred to the *Schwegmann Case,* saying:

> "Now, the opinion of the Supreme Court, written by Mr. Justice Douglas, must be taken to have been the law since the enactment of the Miller-Tydings Act and since the enactment of the Oregon Fair Trade Act. * * * However, later, the McGuire Act went into effect. * * *
>
> "The effect of the McGuire Act * * * is to breathe validity into this Oregon Section, 43-402." [10]

There has been division of opinion as to whether the Miller-Tydings and McGuire Acts apply, retroactively, to transactions completed prior to their enactment,[11] but the application of the Miller-Tydings and McGuire Acts to transactions governed by State acts which were in existence when the Miller-Tydings and McGuire Amendments were enacted, has not been questioned, to our knowledge, by any decision, officially or unofficially reported, except the decision here sought to be reviewed. It was not questioned even by the two State courts which, on non-federal grounds, held that the fair trade acts of their respective states were invalid.[12]

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[10] *Federal Cartridge Corp.* v. *Helstrom,* C. C. H. Trade Reg. Rep., 1952 Trade Cases, Par. 67,366 (Or. C. Ct., Oct. 23, 1952). See also, *General Electric* v. *S. Klein-on-the-Square,* 121 N. Y. S. (2d) 37, 44 (1953); *Johnson & Johnson* v. *Charmley,* 11 N. J. 526, 535, 95 A. (2d) 391 (1953); *Calvert Distillers* v. *Sachs,* 234 Minn. 303, 48 N. W. (2d) 532 (1951); *Sunbeam Corp.* v. *Central Housekeeping Mart,* C. C. H. Trade Reg. Rep., 1952 Trade Cases, Par. 67,379 (Ill. Super. Ct., Cook Co., Dec. 9, 1952); *Eli Lilly* v. *Schwegmann,* 109 F. Supp. 269 (E. D. La., 1953); *Sunbeam Corp.* v. *Payless Drug Stores,* 97 U. S. P. Q. 373, 377 (U. S. D. C., N. D. Cal., May 15, 1953); *Elgin* v. *Druxman,* C. C. H. Trade Reg. Rep., 1953 Trade Cases, Par. 67,498 (Wash. Super. Ct., May 4, 1953).

[11] *Federal Cartridge Corp.* v. *Helstrom, supra;* cf. *Cal-Dak Co.* v. *Sav-On Drugs, Inc., supra,* and *Sunbeam Corp.* v. *MacMillen,* C. C. H. Trade Reg. Rep., 1953 Trade Cases, Par. 67,451 (U. S. D. C. of Md., Feb. 27, 1953).

[12] *Liquor Store* v. *Continental Distilling Corp.,* 40 So. 2d 371 (Fla. Supr. Ct., 1949); *Shakespeare Co.* v. *Lippman's,* 334 Mich. 109; 54 N. W. 2d, 268 (1952). These cases are discussed below, at pp. 30-31.

The position of the Georgia Court, like that of the appellant in the *Prudential Case* [13] puts the amending Acts of Congress to one side, either as not intended to have effect toward validating the State Act, or, if construed otherwise, as ineffective to do so. The Opinion below quotes from the Miller-Tydings and McGuire Acts (App. A, p. A4). Then, after giving lip service to the supremacy clause of the United States Constitution, it proceeds with a discussion of previous decisions of the Georgia Court and decisions of other State courts purporting to support the proposition that a statute which was not valid at the time of its enactment can be made effective only by re-enactment. It assumes that the Georgia Fair Trade Act was, *ab initio*, wholly null and void and without force or effect (App. A, p. A7). Although in other cases the Georgia Court has held it to be the duty of courts to construe statutes so far as possible so as to uphold them and carry them into effect,[14] here the saving clause [15] is ignored and the possibility that there might be intrastate transactions as to which, under the saving clause, the Act would be valid, is neither considered nor left open for future consideration.

The declared purpose of the amendments to the Sherman Act was the removal of Federal impediments to interstate transactions (App. E, p. A18). Under the doctrine applied in the decision below, after the Sherman Act was amended, reenactment of the State fair trade act was required, not just to permit the fair trade policy of Georgia "to operate with respect to interstate contracts" (App. E, p. A18; App.

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[13] *Prudential* v. *Benjamin*, 328 U. S. 408, 422, and see pp. 17-19, *supra*.

[14] *Winter* v. *Jones*, 10 Ga. 190, 54 Am. Dec. 379 (1851); *Lamons* v. *Yarbrough*, 206 Ga. 50, 55 S. E. (2d) 551, 557 (1949); *Barge* v. *Camp*, 209 Ga. 38, 70 S. E. (2d) 360, 364 (1952).

[15] "Section 8. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby." (App. B, p. A13.)

F, p. A26), but to give the Georgia Fair Trade Act validity for any purpose whatsoever. The entire field covering fair trade legislation is thus relegated by the Georgia Court to Federal jurisdiction, and yet, the precedents cited as controlling (App. A, pp. A5-A7) are former decisions of the Georgia Court and decisions of the courts of Nevada, Michigan and California,[16] holding that State acts which, when enacted, were void under a State constitution or statute, were not validated by susequent *State* action.[17] None of these cases involved action by Congress to effectuate State policies by removing Federal barriers to State action.

In holding that the Georgia Fair Trade Act was wholly void, *ab initio,* and in citing authorities for its doctrine, the Georgia Court fails, also, to distinguish between a statute which, when enacted, was unconstitutional, and a statute such as the Georgia Fair Trade Act, which, when enacted, was in conflict with a Federal statute. In one of the decisions on which the Georgia Court relies, this material distinction is explained, thus:

> "The pivotal point in a healing or validating statute is that it must be confined to acts *which the Legislature could previously have authorized.*" [18]

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[16] The one Pennsylvania case cited in this connection, *Erie* v. *Grady,* 150 Pa. 462, 24 Atl. 641 (1892), held an ordinance void because in conflict with a State statute. No subsequent attempt to give it validity was involved. The case seems wholly irrelevant.

[17] The California case cited in this connection in the Opinion below, *Banaz* v. *Smith,* 133 Cal. 102, 65 P. 309 (1901), makes it clear also that even where no Act of Congress is involved, the doctrine urged by the Georgia Court does not apply where, as also in the present case, the previously enacted statute is expressly provided for by the validating legislation. See, also, *Busch* v. *Turner,* 26 Cal. 2d, 817, 161 P. 2d, 456, 459 (1945), where *Banaz* v. *Smith, supra,* is distinguished and explained on this ground.

[18] *Atkinson* v. *Southern Express Co.,* 94 S. C. 444, 78 S. E. 516, 519 (1913), quoting (with italics added), from *State* v. *Whitesides,* 30 S. C. 579, 9 S. E. 661 (1889).

And,

> "Although necessarily retroactive, curative acts are not for that reason invalid; for the general rule is that the Legislature can validate any act which it might *originally* have authorized." [18a]

The constitutionality of the fair trade acts was sustained by this Court in the *Old Dearborn Case* (see pp. 25, 29, *infra*) and is not questioned here, and the Georgia Court concedes that Congress may authorize the State of Georgia to enact fair trade legislation. Under the rule stated above, which is supported even by authorities cited in the Opinion below, the Georgia Fair Trade Act, being any act which Congress "might originally have authorized", is, also, an act which Congress had authority to validate.

The Opinion below, after discussing the decisions purportedly supporting the Georgia Court's doctrine (App. A, pp. A5-A8), refers to *In re Rahrer*, 140 U. S. 545 (1891) where this Court construed an Act of Congress which had removed obstacles to the application of a State law, and held that there was no adequate ground for adjudging that a re-enactment of the State law was required to give it effect. Chief Justice Fuller said (pp. 564, 565) that Congress had "simply removed an impediment to the enforcement of the state laws"; that the act "in terms removed the obstacle * * *". Here, the Senate Report on the Miller-Tydings Amendment uses similar language (App. E, p. A24):

> "In other words, the bill does no more than to remove Federal obstacles to the enforcement of contracts which the States themselves have declared lawful."

[18a] Id., quoting from 26 Enc. of Law, 698, 699.

In a dictum, cited by the Georgia Court as one of its authorities,[19] the majority of the West Virginia Court states its disagreement with the decision of this Court in the *Rahrer Case*. A concurring opinion rejects the position taken in this dictum, saying that it is "denied by the highest authority," and, citing decisions of this Court,[20] adds:

> "So the Supreme Court has three times held that when the ban of the federal supremacy was once removed, the prior state statute operated without reenactment." [21]

In re Rahrer is cited in the *Prudential Case* [22] and its citation in that context makes superfluous any further discussion of the Georgia Court's attempt to distinguish.

There is here no question as to the validity of the Georgia Fair Trade Act under the due process clause of the Federal Constitution. This Court settled that question in the *Old Dearborn Case*, where it held that the primary aim of a fair trade act is "to protect the property—namely, the good will—of the producer * * *", price restrictions serving only "as an appropriate means to that perfectly legitimate end * * *." [23]

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[19] *State* v. *Miller*, 66 W. Va. 436, 66 S. E. 522 (1909); cited in App. A, p. A6. It is plainly dictum because the state statute under consideration in that case had in fact been re-enacted after the passage of the validating Act of Congress. See, also, the comment on this case in *State of West Virginia* v. *Adams Express Co.*, 219 F. 794, 800 (C. C. A. 4, 1915).

[20] *In re Rahrer, supra; Butler* v. *Goreley*, 146 U. S. 303 (1892); *Emert* v. *Missouri*, 156 U. S. 296, 321-(1895).

[21] 66 S. E. at p. 524. In concluding, the concurring opinion in *State* v. *Miller, supra*, makes note of a fourth decision to the same effect, *Central Pacific Railroad* v. *Nevada*, 162 U. S. 512 (1896).

[22] *Prudential* v. *Benjamin*, 328 U. S. 408, 424.

[23] *Old Dearborn* v. *Seagram*, 299 U. S. 183, 193-194 (1936). The *Old Dearborn Case* was against a "non-signer." An action under a fair trade act is not one to enforce a contract but to protect "the property—namely, the good will" represented by a trade mark and to enjoin unfair competition in the use of the trade mark in "loss leader" sales.

Neither is there here any question as to the validity of the Miller-Tydings and McGuire Acts. The Georgia Court concedes that "the provisions of Georgia's fair trade act are not prohibited by the Sherman Act as amended by the Miller-Tydings Act and by the McGuire Act * * *" (App. A, p. A5). But in limiting their effectiveness to future legislation and in excepting then-existing State laws, the Georgia Court has put on the Miller-Tydings and McGuire Acts a construction which makes them wholly ineffective in Georgia, and which would make them inoperative in a vast majority of the States. This construction is not in accord with the decisions of this Court in the *Rahrer* and *Prudential* cases.[24]

In the *Schwegmann Case* this Court said:

> "It should be remembered that it was the state laws that the federal law was designed to accommodate." [25]

Congress clearly did not intend to exclude from this design the 42 States which had fair trade acts when the Miller-Tydings amendment was enacted, or the 45 States having such legislation on their books when the McGuire amendment was enacted. The judgment sought to be reviewed imposes a far more extensive and more radical restriction on the scope of these two Acts of Congress than did the *Schwegmann* decision and presents an issue under Federal law of which the Georgia Court ought not to be the final arbiter.

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[24] *In re Rahrer*, 140 U. S. 545; *Prudential* v. *Benjamin*, 328 U. S. 408.

[25] *Schwegmann* v. *Calvert Corp.*, 341 U. S. 384, 395.

B. The judgment sought to be reviewed is governed by the Georgia Court's nullifying construction of Federal statutes which affect the policies of a vast majority of the States. No real or substantial non-federal question is involved.

Georgia is one of forty-two States which adopted fair trade acts prior to the enactment of the Miller-Tydings Amendment, and it is one of forty-five States with fair trade acts at the time when the McGuire Amendment was enacted (App. G, pp. A35-A37). Whether an Act of Congress intended to effectuate existing State policies requires further action by the State legislatures in order to become effective, clearly is a Federal question. The answer which the Georgia Court gave to that question was necessary for its adjudication of the Georgia Fair Trade Act. The judgment sought to be reviewed is controlled by the decision of the Georgia Court that the Miller-Tydings and McGuire Amendments, which were enacted for the declared purpose of removing Federal barriers to the enforcement of laws known to have already been adopted by nearly all the States, were ineffective for that purpose.

Having adjudicated the Georgia Fair Trade Act as invalid, the Georgia Court necessarily sustained the demurrer (App. A, p. A8). Directly following the statement of this final and ultimate decision, in the Opinion below, there is one brief paragraph in which the Court says that: "Moreover, and for the reasons stated in Harris v. Duncan, 208 Ga. 561 (67 S. E. 2d 692)," Georgia's fair trade act offends the due process clause of the Georgia Constitution and "is for that reason null and void".

This Court will not review a judgment of a State court which is put on an independent non-federal ground, broad enough to sustain it, but it is within the province of this Court to inquire whether a non-federal ground set forth in the judgment of a State court has fair and substantial support. *Ward* v. *Love County*, 253 U. S. 17, 22-23 (1920).

The judgment here sought to be reviewed exemplifies the necessity of not permitting insubstantial and illusory non-federal issues to bar this Court's determination of important federal questions or its interpretation of federal laws.

This is not a case where the record creates uncertainty as to what actually was determined by the State court.[26] The decision was on a demurrer which enumerated two claimed grounds for adjudicating the Georgia Fair Trade Act as invalid under the Sherman Act and four for its adjudication as invalid under the Georgia Constitution (R. pp. 16-19).

The situation here is similar, in many respects, to that in *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940), where the Supreme Court of Minnesota had held that a Minnesota tax law violated both the Federal and State Constitutions and certiorari was granted. This Court remarked that the Minnesota Court's discussion of the Minnesota Constitution was in general terms and "quite inconclusive", whereas its analysis of the corresponding clause of the United States Constitution was specifically related to taxation of the kind involved in the case. From the opinion as a whole, this Court received the impression that the State Court "probably felt constrained to rule as it did" because of the federal decisions which it had cited (309 U. S., at pp. 552-555).

Here, likewise, the Opinion below analyzes the Sherman Act, specifically in relation to the Fair Trade Act, but does not discuss the Georgia Constitution at all, not even in general terms. A comparison of the five pages devoted to the federal question (App. A, pp. A3-A8) with the six and one-half lines devoted to the non-federal question (App. A, p. A8), leaves the definite impression that the Georgia Court decided the case on the federal ground alone.

In certain respects the present situation differs from the situation in the *National Tea Case*, with the result that the doubts which led this Court to remand the cause to the Minnesota Court for clarification, do not exist here.

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[26] Cf. *Honeyman* v. *Hanan*, 300 U. S. 14, 26 (1937).

In the *National Tea Case,* the Minnesota Court:

> "adverted briefly to three of its former decisions which had interpreted Article 9, Sec. 1 of the Minnesota constitution and quoted from one of them. It merely added: 'So much for our own cases'; and proceeded at once to a discussion of cases based solely on the Fourteenth Amendment of the federal constitution." [27]

Here, the Georgia Court cites only one former decision and neither quotes from this one case nor explains its relevance (App. A, p. A8). The question in the single cited case [28] was whether the State legislature may regulate prices where a business, such as the milk business, is affected with a public interest, and the Georgia Court, holding that such a regulatory statute violated the due process clause of the Constitution of Georgia, declared its independence of two decisions of this Court [29] and its disagreement with decisions of the courts in other States.

No such question arises here. The fair trade acts are not concerned with whether a business is affected with a public interest. Their purpose is to protect the good will of trade-mark owners. This Court so held in sustaining the validity of a fair trade act under the due process clause of the Federal Constitution. *Old Dearborn Co.* v. *Seagram,* 299 U. S. 183, 193-194.

In the *National Tea Case,* it was noted that the Minnesota Court "did not declare its independence of the decisions of this Court, when the State constitutional provision avowedly had identity of scope with the relevant clause of the Fourteenth Amendment." [30] In the instant case, the Georgia Court, in concluding that the Georgia Fair Trade Act offends the due process clause of the Georgia Constitution, does not even refer to the *Old Dearborn Case.* This

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[27] *Minnesota* v. *National Tea Co.,* 309 U. S. 551, 552-553.

[28] *Harris* v. *Duncan,* 208 Ga. 561, 67 S. E. (2d) 692 (1951).

[29] *Nebbia* v. *N. Y.,* 291 U. S. 502 (1934); *Highland Farms* v. *Agnew,* 300 U. S. 608 (1937).

[30] *Minnesota* v. *National Tea Co.,* 309 U. S. 551, 556.

is a significant omission, because the *Old Dearborn* decision became an integral part of the history of the fair trade legislation. It is quoted in the House Report which accompanied the Miller-Tydings Bill (App. E, p. A20) and it rarely is omitted from the decision of any court where a fair trade act is involved. The Georgia Fair Trade Act was approved less than three months after this Court handed down its decision in the *Old Dearborn Case*.[31]

"The weight of authority is against the holding of the Georgia court".[32] The Georgia Court could have declared its independence of the *Old Dearborn* decision, just as, in *Harris* v. *Duncan,* supra, it stated its disagreement with the Nebbia decision. It might, if it had chosen, given the due process clause of the Georgia Constitution a construction differing from this Court's construction of the corresponding provision, identical in scope, of the Federal Constitution. That was the course followed by the Florida and Michigan courts. *Liquor Store* v. *Continental Distilling Corp.*, 40 So. (2d) 371, decided in 1949, adjudicating the Florida Fair Trade Act to be unconstitutional, was based squarely on non-federal grounds. The Supreme Court of Florida referred to the decision of this Court in the *Old Dearborn Case* and to the fact that the *Old Dearborn* decision had been followed by some of the State courts, but, saying that the court of last resort of each sovereign state is the final arbiter as to whether an Act conforms to its own Constitution, it rejected these precedents.

In *Shakespeare Co.* v. *Lippman's,* 334 Mich. 109, 54 N. W. (2d) 268, (1952), the defendant had claimed that the transactions in question were in interstate commerce and had pleaded violation of the Sherman Act, but the transactions were treated as being exclusively in intrastate commerce so that the case might be disposed of wholly on the issue

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[31] *Old Dearborn* v. *Seagram,* 299 U. S. 183 (Dec. 7, 1936); App. B, p. A10.

[32] *Elgin* v. *Druxman,* C. C. H. Trade Reg. Rep., 1953 Trade Cases, Par. 67,498 (Wash. Super. Ct., May 4, 1953).

of constitutionality under the State constitution. The Michigan Court referred to the fact that the constitutionality of similar legislation had been upheld in most of the States which had considered the question, and by this Court, and it cited the *Old Dearborn Case* and decisions of the courts of New York, Illinois, North Carolina, Wisconsin, Indiana and New Jersey. The Michigan Court then declared its independence of these precedents and held that the Michigan Fair Trade Act was unconstitutional, saying, "* * * the trial court, nevertheless, considered, as do we, that the better reasoned view is that of the Florida Supreme Court in Liquor Store, Inc. et al. v. Continental Distilling Corp., 40 So. (2d) 371, holding an act of that character unconstitutional."

If the Georgia Court had been persuaded that the validity of the Georgia Fair Trade Act under the Georgia Constitution presents a real and substantial question, it would have stated disagreement with the *Old Dearborn* decision as did the courts of Florida and Michigan. It is apparent that the Georgia Court disagrees, not with the philosophy, reasoning, or legal doctrine represented by the *Old Dearborn* decision but, rather, with the policy of the Georgia legislature in enacting the Georgia Fair Trade Act and with the policy of Congress in giving support to this legislation.

III. CONCLUSION

So that the Supreme Court of Georgia shall not be the final arbiter of the question presented by the petition, a Writ of Certiorari should issue.

Respectfully submitted,

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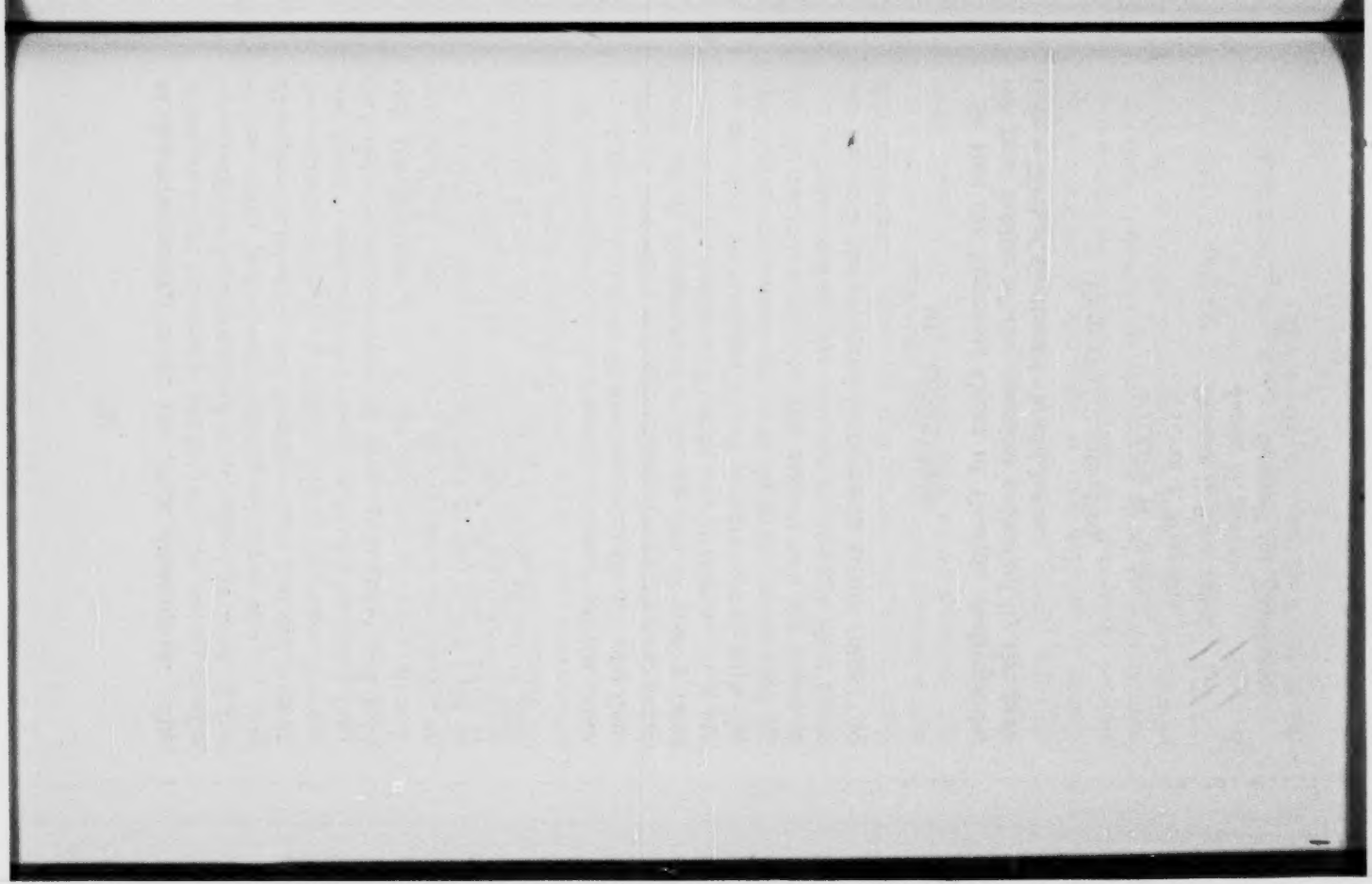

APPENDIX A

Opinion of the Supreme Court of Georgia

No. 18091, *Grayson-Robinson Stores, Inc.* v. *Oneida, Ltd.*, 75 S. E. (2d) 161, Decided February 24, 1953.

By the Court:

1. Georgia's fair trade act when enacted by the General Assembly and when approved by the Governor on March 4, 1937, was contrary to and inconsistent with the provisions of the Sherman Act as they were at that time; it, consequently, offended the supremacy clause as well as the commerce clause of the Federal Constitution and was, therefore, ab initio void.

2. A void statute can be made effective only by re-enactment.

3. The Act of 1937 known as Georgia's Fair Trade Act is null and void since it offends article 1, section 1, paragraph 3, of the Constitution of 1945, which provided that "No person shall be deprived of life, liberty, or property except by due process of law."

Candler, Justice. Oneida, Ltd., brought this action against Grayson-Robinson Stores, Inc., under Georgia Fair Trade Act of 1937 (Ga. L. 1937, p. 800) and particularly under Section 6 of the Act which reads as follows: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." The petition in substance alleges: The plaintiff, a New York corporation, manufactures and sells in interstate commerce silverware under the trademark or

tradename of "Community." Its products sold under this name enjoy a good reputation and the plaintiff's goodwill is associated with the trademark. The plaintiff has entered into contracts establishing minimum retail sale prices of its products with retailers in the State of Georgia. Sales are made by the plaintiff to retailers operating under minimum retail sales contracts and "Community" silverware is advertised and sold to the retail trade at the price so fixed. The defendant operates a retail store in Atlanta, Georgia, and advertises, offers for sale, and sells "Community" products which it purchases from sources other than the manufacturer, at prices less than the prices fixed by the plaintiff under its "fair trade contracts." The defendant conducts these activities in utter disregard of the fixed retail sales price schedules issued by the plaintiff and wilfully and knowingly sells merchandise bearing the name "Community" at less than the prices so fixed. These sales by the defendant are "loss leader" sales. The plaintiff has no adequate remedy at law for the injury to its goodwill and relations with its dealers, which it is incurring by reason of the defendant's sales below the plaintiff's schedule of fixed prices. The defendant has signed no contract with the plaintiff under the provisions of Georgia's fair trade act but is known in the vernacular as a "nonsigner" of the trade agreement contemplated by the Act. The prayers are for process, injunction and general relief.

The petition was demurred to generally as stating no cause of action upon the ground and for the reason that Georgia's fair trade act of 1937 has no force and effect and is null and void because it was, when enacted and approved on March 4, 1937, contrary to and inconsistent with the provisions of the Sherman Act which Congress passed on July 2, 1890, and upon the further ground that the Georgia act of 1937, when passed by the General Assembly, offended for stated reasons enumerated provisions of the Georgia Constitution of 1877. After a hearing, the court overruled all of the grounds of the general demurrer.

The defendant excepted and sued out a writ of error to this court.

1. It is contended by the defendant and argued by its counsel that Georgia's fair trade act which was passed and approved on March 4, 1937, was ab initio void, since the General Assembly had no power to enact it. This position is well-taken. The Constitution of the United States by article 6, clause 2, provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Code, § 1-602. And our Constitution of 1877, as well as that of 1945, provides the same. Code, § 2-8501. Code, Ann. Supp. § 2-8001. See, in this connection, Southern Ry. Co. v. Atlanta Sand & Supply Co., 135 Ga. 35, 39 (68 S. E. 807); Gainey v. Bank of Thomasville, 176 Ga. 736 (168 S. E. 877); and Ford v. Lone Star Cement Co., 181 Ga. 212, 215 (181 S. E. 773). And by article 1, section 8, sub-section 3, of the Federal Constitution, Congress has exclusive power "To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes." Code, § 1-125. Exercising this power, Congress on July 2, 1890, passed the Sherman Act (26 Stat. 209, 15 U. S. C. § 1) which declared illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign Nations." Under the provisions of the Sherman Act, as originally passed by Congress, interstate resale price-fixing and price-maintenance arrangements, by contract or otherwise were prohibited; they were "in restraint of trade" and, therefore, illegal per se. Dr. Miles Medical Company v. John D. Park & Sons Co., 220 U. S. 373; United States v. Socony-Vacuum Oil Co., 310 U. S. 150; Kiefer-Stewart Co. v. Seagram & Sons, 340 U. S. 211. But Con-

gress on August 17, 1937, passed the Miller-Tydings Act (50 Stat. 693, 15 U. S. C. § 1), as an amendment to § 1 of the Sherman Act and that amendment provides in material part that "nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale" of specified commodities when "contracts or agreements of that description are lawful as applied to intrastate transactions" under local law. In 1951, the Supreme Court of the United States in Schwegmann Bros. v. Calvert Distillers Corp., 341 U. S. 384, 386, held that the Miller-Tydings Amendment to the Sherman Act excepted only "contracts or agreements" prescribing minimum prices for the resale of trademarked commodities where such contracts or agreements were valid under State statute, and that a retailer who had not signed a contract for price maintenance was not to be subjected to the schedule of a price maintenance plan. See, also, Sunbeam Corp. v. Wentling, 185 Fed. 2d 903; s. c. 192 Fed. 2d 7. However, Georgia's fair trade act was passed by the legislature prior to the Miller-Tydings amendment to the Sherman Act.

2. But it is urged by counsel for the defendant in error that Georgia's fair trade act of 1937 no longer offends the Sherman Act since it was entirely removed from its prohibitive provisions when Congress on July 14, 1952, passed the McGuire Act (66 Stat. 632, 15 U. S. C. § 45) which in part recites: "It is the purpose of this Act to protect the rights of the State under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce." And which by Sec-

tion 3 thereof also provides: "Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby." So we accordingly agree that the provisions of Georgia's fair trade act are not prohibited by the Sherman Act as amended by the Miller-Tydings Act and by the McGuire Act; but we do not agree to the contention that Georgia's fair trade act became valid, without re-enactment, after the Sherman Act was thus amended. Since Georgia's fair trade act was contrary to and inconsistent with the terms of the Sherman Act before it was amended by the Miller-Tydings Act and the McGuire Act, it offended the supremacy clause as well as the commerce clause of the Federal Constitution, and our Constitution of 1945 by article 1, section 4, paragraph 1, declares that legislative acts which violate the Constitution of the United States are void and the judiciary shall so declare them. Code, Ann. Supp. § 2-402. The time with reference to which the constitutionality of an act is to be determined is the date of its passage by the enacting body (Jones v. McCaskill, 112 Ga. 453, 37 S. E. 724); and if it is unconstitutional then, it is forever void. Christian v. Moreland, 203 Ga. 20 (45 S. E. 2d, 201). "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and in legal contemplation is as inoperative as if it had never been passed. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted." 11 Am. Jur. (Constitutional Law) 827, § 148. The

Supreme Court of West Virginia in State v. Miller, 66 W. Va. 436 (66 S. E. 522, 19 Ann. Cas. 604), held that "A void statute can be made effective only by re-enactment," and as authority for its ruling cited the Georgia case of Jones v. McCaskill, supra, and the cases of State v. Tuffy, 20 Nev. 427 (22 Pac. 1054, 19 Am. St. Rep. 374); Comstock, etc. Co. v. Allen, 21 Nev. 325 (31 Pac. 434); Erie v. Brady, 150 Pa. 462 (24 Atl. 641); Seneca Mining Co. v. Osmun, 82 Mich. 573 (47 N. W. 25, 9 L. R. A. 770); Banaz v. Smith, 133 Cal. 102 (65 Pac. 309). "It is clear that Congress cannot, by authorization or ratification give the slightest effect to a state law or Constitution which is in conflict with the Constitution of the United States. Whether an act of Congress can validate state statutes which were previously invalid because inconsistent with Federal legislation has not been uniformly decided. One view states that a state statute which was unconstitutional because it amounted to a violation of the power of Congress over interstate commerce is not validated by an act of Congress dealing with the subject matter which would render a later application of the state act merely supplemental to the act of Congress. This holding results from the theory that the removal of constitutional objections to an unconstitutional statute does not validate or revive it." 11 Am. Jur. (Constitutional Law) 833, § 151. In support of this view, the author cites, among other cases, State v. Miller, supra, which cites and follows our ruling in Jones v. McCaskill, supra. The court in Wilkins v. Mayor and Aldermen of Savannah, 152 Ga. 638 (111 S. E. 42) followed the full-bench ruling in Jones v. McCaskill, supra, and at page 643 said: "By the [legislature's] act of August 18, 1919, the city is authorized to charge for repaving its streets the entire cost thereof to abutting-property owners. This special act was passed when the general law embraced in section 870 of the code was in force, and seems to us to be clearly in conflict with the provision of the constitution of this State which forbids the passage of any special act for which provision had been made by an existing general law.

This constitutional infirmity of the act of August 18, 1919, is not cured by the fact that this section of the code was amended on August 19, 1919, providing that 'where any change or modification is made in the charter of any city having a population of not less than 65,000 and not more than 100,000, in regard to the method of paving, by an amendment to such charter, provision may be made in such amendment for the renewal and repairing of any existing pavement under the provisions of such amendment.' This remedy came too late to save the fatal malady of the act of August 18, 1919." Again, in Reynolds v. Brosnan, 170 Ga. 773 (154 S. E. 264), we unanimously held that a zoning statute for the City of Albany which, when passed by the legislature in 1923, was unauthorized by the Constitution of 1877 did not become a valid statute by the adoption of a subsequent amendment to the constitution authorizing it. See, in this connection and to the same effect, Norris v. Town of Union City, 184 Ga. 283 (191 S. E. 105); Jones v. McCaskill, supra; and Atkinson v. Southern Express Co., 94 S. C. 444 (78 S. E. 516, 48 L. R. A. (N. S.) 349). In the case last cited and at page 519 of the opinion, the court said: "The removal of the constitutional objections to a statute, that rendered it null and void, does not by operation of law give it force and effect, nor can it be made valid by a subsequent statute." As to this, we have not overlooked, nor failed to consider, In re Rahrer (Wilkinson v. Rahrer), 140 U. S. 545 (35 L. ed. 572, 11 S. Ct. 865), cited and strongly relied upon by counsel for the defendant in error. We, however, see no conflict. There, unlike here, the state statute involved was not void when enacted by the legislature. It dealt with a subject—intoxicating liquors, over which Congress did not have exclusive regulating power under the Federal Constitution, and in that case the court said: "This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not oper-

ate upon articles [imported liquors] occupying a certain situation until the passage of the act of Congress. The act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the state law was required before it could have the effect upon imported which it had always had upon domestic property." Accordingly, the petition was subject to general demurrer.

3. Moreover, and for the reasons stated in Harris v. Duncan, 208 Ga. 561 (67 S. E. 2d, 692), Georgia's fair trade act of 1937 offends article 1, section 1, paragraph 3, of our Constitution of 1945 which provides that "No person shall be deprived of life, liberty, or property except by due process of law." Code, Ann. Supp. § 2-103. And the act is for that reason null and void.

For the reasons stated in the preceding divisions the judgment complained of is erroneous.

Judgment reversed. All the Justices concur, except Atkinson, P. J., not participating.

Head, Justice, concurring specially. Our statutes (Code, § 37-712 and Chapter 106-99) do not draw any distinction between a "trade-mark" and a "trade name." In many of the decisions by the courts of this country in actions alleging unfair competition little regard is given to any legal or technical distinction between a trade-mark and a trade name, since in either instance the most common form of infringement or imitation is the use by another in a manner calculated to deceive the public. Unfair competition, however, according to many authorities, may exist in various other forms. In the present case the sole unfair competition alleged is a violation of contracts based on the minimum retail resale prices established by Oneida, Ltd. under provisions of the act known as the "Fair Trade Act," Ga. L. 1937, pp. 800-804 (Code, Ann. Supp., § 106-401, et seq.). Since the petitioner did not seek relief for any alleged acts of the defendant in deceiving, misleading, and

confusing the public, and capitalizing on the reputation and good will of the petitioner, I concur in the judgment of reversal.

Harris v. Duncan, 208 Ga. 561 (cited in Division 3 of the opinion), would not be applicable in an action seeking relief against the defendant for deceiving, misleading, and confusing the public, and capitalizing on the good will and reputation of the petitioner by an unauthorized use of its trade-mark or trade name. In this connection see Kay Jewelry Co. v. Kapiloff, 204 Ga. 209; and Gordy v. Dunwody, No. 18105, decided February 24, 1953.

APPENDIX B

The Georgia Fair Trade Act

ACT No. 100 OF THE GENERAL ASSEMBLY OF GEORGIA,
APPROVED MARCH 4, 1937.
(Georgia Laws of 1937, p. 800)
(Georgia Code, 1933, Ann., Sec. 106-407)

An Act to protect trademark owners, producers, distributors, and the general public against injurious and uneconomical practices in the distribution of competitive commodities bearing a distinguishing trademark, brand or name, through the use of voluntary contracts establishing minimum resale prices, and providing for refusal to sell unless such minimum resale prices are observed; and for other purposes.

Be it enacted by the General Assembly of Georgia:

SECTION 1. The following terms, as used in this Act, are hereby defined as follows:

(A) "Commodity" means any subject of commerce.

(B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(D) "Retailer" means any person selling a commodity to consumers for use.

(E) "Person" means an individual, a corporation, a partnership, an association, a joint stock company, a business trust or any unincorporated organization.

SECTION 2. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Georgia by reason of any of the following provisions which may be contained in such contract:

(A) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(B) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

(C) That the seller will not sell such commodity:

(1) To any wholesaler, unless such wholesaler will agree not to resell the same to any retailer unless the retailer will in turn agree not to resell the same except to consumers for use and not at less than the stipulated minimum price, and such wholesaler will likewise agree not to resell the same to any other wholesaler unless such other wholesaler will make the same agreement with any wholesaler or retailer to whom he may resell; or

(2) To any retailer, unless the retailer will agree not to resell the same except to consumers for use and at not less than the stipulated minimum price.

SECTION 3. For the purpose of preventing evasion of the resale price restrictions imposed in respect of any commodity by any contract entered into pursuant to the provisions of this Act (except to the extent authorized by the said contract):

(A) The offering or giving of any article of value in connection with the sale of such commodity;

(B) The offering or the making of any concession of any kind whatsoever (whether by the giving of coupons or otherwise) in connection with any such sale; or

(C) The sale or offering for sale of such commodity in combination with any other commodity, shall be deemed a violation of such resale price restriction, for which the remedies prescribed by Section 6 of this Act shall be available.

SECTION 4. No minimum resale price shall be established for any commodity, under any contract entered into pursuant to the provisions of this Act, by any person other than the owner of the trademark, brand or name used in connection with such commodity or by a distributor specifically authorized to establish said price by the owner of such trademark, brand or name.

SECTION 5. No contract containing any of the provisions enumerated in Section 2 of this Act shall be deemed to preclude the resale of any commodity covered thereby without reference to such contract in the following cases:

(A) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; Provided the owner of such stock shall give to the producer or distributor of such commodity prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price;

(B) When the trademark, brand or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof;

(C) When the goods are altered, second-hand, damaged, defaced, or deteriorated and plain notice of the fact is given to the public in the advertisement and sale thereof,

such notice to be conspicuously displayed in all advertisements and to be affixed to the commodity;

(D) By any officer acting under an order of court.

SECTION 6. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

SECTION 7. This Act shall not apply to any contract or agreement between or among producers or distributors or between or among wholesalers or between or among retailers as to sale or resale prices.

SECTION 8. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

SECTION 9. This Act may be known and cited as the "Fair Trade Act."

SECTION 10. All laws or parts of laws inconsistent herewith are repealed hereby to the extent of such inconsistency.

APPENDIX C

The Miller-Tydings Act

ACT OF AUGUST 17, 1937, CHAPTER 690, TITLE VIII.
PUBLIC LAW No. 314, SEVENTY-FIFTH CONGRESS, FIRST SESSION
(H.R. 1611)
(50 Stat. 673, 15 U. S. C. 1)

TITLE VIII—AMENDMENT TO THE ANTITRUST LAWS

Section 1 of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, is amended to read as follows:

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided,* That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes', approved September 26, 1914: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Approved, August 17, 1937.

APPENDIX D

The McGuire Act

ACT OF JULY 14, 1952, CHAPTER 745
PUBLIC LAW 542, EIGHTY-SECOND CONGRESS, SECOND SESSION (H.R. 5767)
(66 Stat. 632, 15 U. S. C. Sec. 45)

An Act to amend the Federal Trade Commission Act with respect to certain contracts and agreements which establish minimum or stipulated resale prices and which are extended by State law to persons who are not parties to such contracts and agreements, and for certain other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That:

It is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce.

SEC. 2. Section 5 (a) of the Federal Trade Commission Act, as amended, is hereby amended to read as follows:

"Sec. 5 (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

"(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of

action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

"(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

"(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

Approved July 14, 1952.

APPENDIX E

Extracts from House and Senate Reports on the Miller-Tydings Act

Extracts from House Report No. 382
Seventy-fifth Congress, First Session
(To accompany H. R. 1611)
Dated, March 11, 1937.

* * * * * * *

The Committee on the Judiciary, to whom was referred the bill (H. R. 1611) to amend the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, after consideration, report the same favorably to the House with an amendment with the recommendation that as amended the bill do pass.

* * * * * * *

GENERAL STATEMENT

The sole objective of this proposed legislation is to permit the public policy of States having "fair trade acts" to operate with respect to interstate contracts for the resale of goods within those States. The fair-trade acts referred to legalize the maintenance, by contract, of resale prices of branded or trade-marked goods which are in free competition with other goods of the same general class.

To accomplish this end, the reported bill amends section 1 of the Sherman Antitrust Act which declares every contract in restraint of trade illegal. The amendment adds a sentence to the section, in the nature of a limitation, to the effect, in substance, that nothing therein contained shall render illegal contracts prescribing minimum prices or other conditions for resale of branded or trade-marked goods when such contracts are lawful as to intrastate transactions under the State law of the State in which the resale is to be made; and that the making of such contracts shall

not be an unfair method of competition under section 5 of the Federal Trade Commission Act.

* * * * * *

State Fair Trade Acts

State fair trade acts typically provide, first, that contracts may lawfully be made which provide for maintenance by contract of resale prices of branded or trade-marked competitive goods. Second, that third parties with notice are bound by the terms of such a contract regardless of whether they are parties to it.

* * * * * *

The following States, the committee is advised, have adopted fair trade acts: California, Washington, Oregon, Montana, Wyoming, Arizona, New Mexico, Utah, North Dakota, South Dakota, Kansas, Louisiana, Arkansas, Iowa, Wisconsin, Illinois, Kentucky, Tennessee, Indiana, Ohio, Georgia, Virginia, West Virginia, Pennsylvania, Maryland, New York, New Jersey, and Rhode Island.

The committee is advised that in addition one house of each of the following States have passed a fair trade bill: South Carolina, North Carolina, Idaho, Colorado, and Oklahoma.

The committee is further advised that bills are pending in the Legislatures of Nevada, Michigan, Minnesota, Texas, Mississippi, Delaware, Missouri, Connecticut, Massachusetts, New Hampshire, and Maine; and that only one State, Vermont, has definitely rejected legislation of this character.

Economic Aspects

The anticipated economic effects of the legislation here proposed were presented both by proponents and opponents of the bill in the hearings held by the subcommittee of the Committee on the Judiciary in charge of the bill. On the one hand it is urged that predatory price cutting is a weapon of monopolistic large distributors to crush

small businessmen. On the other hand, it is contended that price-maintenance legislation tends unduly to enhance the price of goods to the consumer. To this argument it is answered that the free play of competition between products of different manufacturers of the same general class will prevent such a result.

However, in the opinion of the committee, those arguments are more properly addressed to the State legislatures considering the enactment of fair trade acts. It is the legislature's responsibility to fix the public policy of the State. This legislation merely seeks to help effectuate a public policy so fixed in a State. It has no application to any State which does not see fit to enact a fair trade act.

In this connection the committee invites attention to the following paragraph of the opinion of the Supreme Court,* heretofore referred to, upholding the constitutionality of the Illinois act, the Court speaking through Mr. Justice Sutherland:

> "There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the goodwill and business of the producer and distributor of identified goods, but injurious to the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion, and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned. Where the question of

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* *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183, 195 (1936).

what the facts establish is a fairly debatable one we accept and carry into effect the opinion of the legislature. *Radice* v. *New York* (264 U. S. 292, 294); *Zahn* v. *Board of Public Works* (274 U. S. 325, 328, and cases cited)."

EFFECTUATION OF STATE PUBLIC POLICY

Your committee respectfully submit that sound public policy on the part of the Federal Government lies in the direction of lending assistance to the States to effectuate their own public policy with regard to their internal affairs. It is submitted that this is especially true where such assistance, as in this instance, consists of removing a handicap resulting from the surrender of the power over interstate commerce by the States to the Federal Government.

* * * * * *

Extracts from Senate Report No. 257
Seventy-fifth Congress, First Session
(To accompany S. 100)
Dated, March 29, 1937

* * * * * *

In 1933 a law was enacted by the State of California authorizing a manufacturer or producer of a commodity which bears his trade mark, brand, or name, and which is sold in free and open competition with commodities of the same general class produced by others to make a contract that the purchaser will not resell such commodity except at the price stipulated by the manufacturer or producer.

The purpose of the California act, as expressed in its title, was to protect trade-mark owners, distributors, and the general public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand, or name, and the particular

practice against which it was directed was the so-called loss-leader selling.

Since the passage of the California act similar legislation has been enacted in 12 other States, namely, New York, Illinois, Pennsylvania, New Jersey, Oregon, Washington, Wisconsin, Iowa, Maryland, Ohio, Virginia, and Rhode Island (the last 3 since the introduction of the proposed bill).

In still other States contracts stipulating minimum resale prices are valid at common law.

In the States where such contracts are lawful, it has been found that loss-leader selling of identified merchandise sold under competitive conditions operates as a fraud on the consumer, destroys the producer's goodwill in his trade mark, and is used by the large merchant to eliminate his small independent competitor.

In recommending the passage of S. 3822 the committee, while fully recognizing the evils of loss-leader selling, is not required to determine the effectiveness of the device adopted by the States to eliminate the same.

It is sufficient that this type of selling unquestionably has had a disastrous effect upon the small independent retailer, thereby tending to create monopoly, and that a large number of States have found that its evil effects can be mitigated, if not eliminated, by legalizing contracts stipulating minimum resale prices.

The Congress is not called upon to pass upon the effectiveness of the remedy, but it should not put obstacles in the way of efforts of the individual States to make the remedy effective.

Though there is no specific adjudication on the subject, it is believed that contracts stipulating minimum resale prices, even when they are made or are to be performed in a State where such contracts are lawful, may violate the

Sherman Act whenever the goods sold under the contract move in interstate commerce.

Consequently, many manufacturers not domiciled in the state of the vendee are unwilling to run the risk of violating the Federal law, and the effectiveness of the State fair-trade laws is thereby seriously impaired.

S. 100 removes the doubt as to the applicability of the Sherman Act by expressly legalizing such contracts where legal under the laws of the State where made or where they are to be performed.

Moreover, the proposed bill declares such contracts shall not be an unfair method of competition under the Federal Trade Commission law.

The language of the bill, in describing the class of commodities to which it is applicable, follows closely the language of the State acts, and the scope of the bill is therefore carefully limited to commodities "in free and open competition with commodities of the same general class produced by others."

The State acts are in no sense general price-fixing acts. They merely authorize a manufacturer or producer to enter into contracts for the maintenance of his price, but they do not compel him to do so. In other words, they are merely permissive.

They do not authorize horizontal contracts, that is to say, contracts or agreements between manufacturers, between producers, or between wholesalers, or between retailers as to the sale or resale price of any commodity.

They apply only to commodities which are in free and open competition with commodities of the same general class produced by others, and they therefore do not in any sense restrain trade or competition. In fact, they legalize a device which is intended to increase competition and prevent monopoly.

But most important, from the standpoint of the Congress, the proposed bill merely permits the individual States to function, without Federal restraint, within their proper sphere, and does not commit the Congress to a national policy on the subject matter of the State laws.

In other words, the bill does no more than to remove Federal obstacles to the enforcement of contracts which the States themselves have declared lawful.

APPENDIX F

Extracts from House and Senate Reports on the McGuire Act

Extracts from House Report No. 1437

Eighty-second Congress, Second Session

(To accompany H.R. 5767)

Dated, February 27, 1952.

GENERAL STATEMENT

The primary purpose of the bill is to reaffirm the very same proposition which, in the committee's opinion, the Congress intended to enact into law when it passed the Miller-Tydings Act (act of August 17, 1937, title VIII, 50 Stat. 673, 15 U. S. C. sec. 1), to the effect that the application and enforcement of State fair-trade laws—including the nonsigner provisions [1] of such laws—with regard to interstate transactions shall not constitute a violation of the Federal Trade Commission Act or the Sherman Antitrust Act. This reaffirmation is made necessary because of the decision of a divided Supreme Court in *Schwegmann* v. *Calvert Distillers Corporation* (341 U. S. 384, May 21, 1951). In that case, six members of the Court held that the Miller-Tydings Act did not exempt from these Federal laws enforcement of State fair trade laws with respect to nonsigners. Three members of the Court held that the Miller-Tydings Act did so apply.

The end result of the Supreme Court decision has been seriously to undermine the effectiveness of the Miller-

[1] The nonsigner provisions permit enforcement of minimum or stipulated prices against any person who willfully and knowingly advertises, offers for sale, or sells any fair-traded commodity at less than the price stipulated in a resale price maintenance contract, whether or not such person is or is not a party to such contract.

Tydings Act and, in turn, of the fair-trade laws enacted by 45 States. H. R. 5767, as amended, is designed to restore the effectiveness of these acts by making it abundantly clear that Congress means to let State fair-trade laws apply in their totality; that is, with respect to nonsigners as well as signers.

The bill further provides that the application of these State laws to interstate transactions shall not constitute a burden upon interstate commerce. The purpose of this provision is to remove any obstacle, as far as Federal law is concerned, which might stand in the way of a broader interpretation of State fair-trade laws so as to make them applicable to retail transactions and retail advertising which cross State lines. The possible existence of such an obstacle was suggested by the United States Circuit Court of Appeals for the Third Circuit in its recent decision in *Sunbeam Corporation* v. *Wentling* (185 F. 2d 903, December 8, 1950). In that case the court held that the Pennsylvania law should not be construed to apply to sales by Pennsylvania retailers to consumers in other States, or to advertisements in publications published in other States, because, so construed, the Pennsylvania statute might be considered a burden upon interstate commerce and might, therefore, be declared unconstitutional.

The committee, through its Subcommittee on Fair Trade Legislation, held extensive hearings on H. R. 5767, in the course of which proponents and opponents of fair trade were heard. The bill has the support of a great number of trade associations and organizations which represent a large segment of American wholesalers and retailers, including druggists, jewelers, hardware merchants, sporting-goods distributors, photographic-equipment stores, and so forth. It also has the support of several prominent manufacturers who volunteered to testify before the committee.

The hearings before the Committee on Interstate and Foreign Commerce were as complete as they could be made.

The committee not only heard all of the witnesses who offered to testify, but it invited to testify all the known opponents of fair trade, several of whom, unfortunately, failed to appear.

* * * * * * *

In this connection, the committee was greatly interested in the testimony of the Federal Trade Commission. The Commission opposed the bill H. R. 5767 on economic and legal grounds. The representative of the Federal Trade Commission stated that the Commission had on several occasions, on these grounds, recommended in favor of the outright repeal of the Miller-Tydings Act. The Commission witness, however, was frank enough to state that there were grounds other than economic and legal grounds which might be considered as furnishing valid arguments in favor of Federal validation of State fair trade legislation.

* * * * * * *

Under all these circumstances, the committee feels amply justified in recommending enactment of H. R. 5767, as amended, which would permit the several States to experiment further with fair-trade legislation.

If price rigidities do later result from fair-trade laws that are determined to be evils greater than the benefits derived from such laws, the States may want to modify these laws and policies appropriately. However, for the time being, as far as the Federal Government is concerned, the committee feels the States should be left free to protect their trade in the best manner known to them from predatory price practices.

* * * * * * *

VIEWS OF THE DEPARTMENT OF COMMERCE CONCERNING LEGISLATION PROVIDING FOR MINIMUM RESALE PRICE MAINTENANCE

Title 8 of the act of August 17, 1937 (ch. 690, 50 Stat. 693) (popularly known as the Miller-Tydings amendment),

amended the Sherman Antitrust Act to provide that nothing contained in that act shall make illegal contracts or agreements to fix minimum prices for resale of a commodity which bears, or the label or container of which bears, a trade-mark, brand, or name of the producer or distributor thereof and which is in free and open competition with commodities of the same general class produced or distributed by others if such contracts or agreements are lawful as applied to intrastate transactions under any statute, law, or public policy in any State, Territory, or the District of Columbia in which such resale is to be made or to which the commodity is to be transported for such resale. Title 8 also provided that such contracts or agreements would not be an unfair method of competition under section 5 of the Federal Trade Commission Act. It also included a specific statement that horizontal price agreements were not authorized or made legal. Shortly after the enactment of this legislation many States passed laws making lawful resale price-maintenance contracts or agreements with respect to intrastate transactions. Most, if not all, of those laws contained the so-called nonsigners clause which provided that such contracts or agreements made with one distributor within the State applied to every other distributor of that commodity within the State who was provided with notice of the terms of the contract or agreement. The clause allowed such contracts or agreements to be enforced against both signers and nonsigners of the contract or agreement.

In 1951 the Supreme Court of the United States in the case of *Schwegmann Brothers et al.* v. *Calvert Distillers Corp.* (341 U. S. 384) held that contracts establishing minimum prices for resale of commodities in commerce could not be enforced against distributors not parties to such a contract. Recognizing that the practical effect of the Schwegmann case was to nullify the Miller-Tydings amendment and therefore the minimum resale price laws of the States, several Members of the Congress have introduced

bills providing that such contracts may be enforced against nonsigners if the State law contains a "nonsigners clause," without constituting a violation of the Federal Trade Commission Act or the antitrust acts. Legislation to repeal the Miller-Tydings amendment has also been introduced.

The position of the Department of Commerce, in commenting on this legislation, is influenced by the organic responsibilities of the Department in encouraging higher standards of business ethics and operations and also by the responsibility of the Department in protecting the interests of small business.

Without the Miller-Tydings Act, State fair-trade laws would be largely inoperative since, without this enabling act applying to interstate trade, it would undoubtedly be necessary for a manufacturer to be incorporated in each State in which he wished to issue fair-trade contracts. This procedure would add materially to the cost of distribution, a policy to which the Department is justifiably opposed; and it is manifest that a large number of manufacturers now working under fair-trade contracts would drop such contracts under those conditions and that the State fair-trade laws thereupon would become a matter of only academic interest. Since a repeal of the Miller-Tydings amendment would nullify State fair-trade laws, the Department's attitude regarding this amendment reasonably might be based on its view of the fair-trade laws themselves. And with reference to these State laws, since 45 States have enacted them, there seems to be a clear-cut matter of public policy, affecting 45 States, involved in support or opposition to the Miller-Tydings amendment.

The same reasoning applies to the "nonsigner" clause typical to a State fair-trade law. In considering the wisdom of this clause, however, we must recognize that without the clause, fair-trade contracts in any State would be meaningless, because the firms who precipitate price wars are the very ones who would not sign the fair-trade con-

tract. If all competitor retailers were not treated alike in this respect, the stage would be set for wide-open price wars in any State. In considering the "nonsigner" clause, therefore, we must conclude that without such a clause, fair-trade laws would be meaningless.

Since either of the above two features spells life or death for State fair-trade laws themselves, a decision for or against the Miller-Tydings amendment, or the nonsigner clause, must be made with due consideration of the values attached to this type of resale price maintenance law, and upon the basis of public policy with reference to fair-trade laws.

* * * * * * *

Extracts from Senate Report No. 1741
Eighty-second Congress, Second Session
(To accompany H.R. 5767)

Dated, June 12 (legislative day, June 10), 1952.

* * * * * * *

FEDERAL TRADE COMMISSION,
Washington 25, May 21, 1952.

HON. EDWIN C. JOHNSON,
Chairman, Committee on Interstate and Foreign Commerce,
United States Senate, Washington, D. C.

MY DEAR MR. CHAIRMAN: In response to the request made in your letter of May 12, 1952, for comment of the Commission upon H. R. 5767, Eighty-second Congress, second session, which has been referred to your committee for consideration, the following is submitted:

The principal purpose of the proposed legislation is to overcome the effect of the recent decision of the Supreme Court in the Schwegmann case (*Schwegmann Bros.* v. *Calvert Distillers Corporation,* 341 U. S. 384, decided May 21,

1951). In that case the Supreme Court held that the Miller-Tydings Act does not make binding upon nonsigners resale prices fixed in contracts under State resale price maintenance laws, insofar, of course, as interstate commerce is concerned. The bill proposes to reenact as an amendment to the Federal Trade Commission Act (and to limit the application of the Sherman Antitrust Act accordingly) the presently existing Miller-Tydings amendment to the Sherman Act but with the addition of the nonsigner clause, and with a provision that resale price maintenance contracts and the enforcement thereof against a signer or nonsigner shall not constitute a burden upon interstate commerce.

Prior to the Miller-Tydings Act, decisions in a number of cases under the Sherman and Federal Trade Commission Acts had made it clear that the failure of a retailer to observe the resale prices marked on trade-marked or branded goods did not create a cause of action in favor of the manufacturer either under the common law or under the patent or copyright laws. Moreover, the courts held that where a manufacturer maintained the resale prices of his identified goods by a system of contracts or equivalent cooperative methods, those contracts were void and such methods illegal under both the Sherman and the Federal Trade Commission Acts.

The Miller-Tydings Act amended the Sherman Act by legalizing minimum resale price agreements or contracts respecting trade-marked or otherwise identified goods sold in interstate commerce provided that the commodities affected were resold in any State that had legalized this type of contract, or agreement with respect to resales made within its boundaries. The act also amended the Federal Trade Commission Act by providing that the making of such contracts should not constitute an unfair method of competition under section 5 of the Federal Trade Commission Act.

Resale price maintenance laws—that is, laws declaring as not in violation of the law of the particular State cer-

tain kinds of price maintenance contracts and providing that nonsigners of such contracts with knowledge thereof should be bound by the price stipulations therein—were on the statute books of 45 States as of May 1, 1941. Most of these States adopted price maintenance laws in 1937 soon after the decision of the Supreme Court in *Old Dearborn Distributing Company* v. *Seagram Distillers Corporation* (299 U. S. 183, decided December 7, 1936) declaring as constitutional the principal provisions, including the nonsigner clause, of the Illinois price maintenance law.

The legal principle involved in the proposed legislation and in the State laws concerning resale price maintenance is not a mere authorization of contracts for the fixing of resale prices. That authorization now exists under the Miller-Tydings amendment as interpreted by the Supreme Court in Schwegmann case. The new principle introduced by this bill is that the Congress shall specifically approve the so-called nonsigner clause. Thus, if this bill is enacted, a private contract, the provisions of which would be determined without public hearing and apart from any public supervision as to reasonableness, would be made binding upon all dealers and the consuming public.

* * * * * *

One of the stated purposes of the proposed legislation is "to permit such [State] statutes, laws and public policies to apply to commodities, contracts, agreements and activities in or affecting interstate or foreign commerce." The Miller-Tydings Act exempted from the application of the Sherman and Federal Trade Commission Acts, contracts prescribing minimum prices for the resale of an identified commodity where such contracts are lawful "as applied to intrastate transactions, under any statute, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, in which such resale is to be made, or to which the commodity is to be transported for such resale." Thus, it appears to be a purpose of the present bill to make State laws and public policy applicable to

commodities transported in interstate and foreign commerce which would extend both the purpose and provisions of the Miller-Tydings Act. If this extension is made by the enactment of this bill, an area of interstate commerce would be made subject to regulations in accordance with the provisions of State law. In other words, the present bill proposes that Congress exempt from the application of Federal antitrust law an area of interstate commerce and to give consent to State regulation thereof.

* * * * * *

Mr. Herman S. Waller, general counsel, National Association of Retail Druggists

This measure is urgently needed by the 45 States in the Union for the adequate enforcement of their respective State fair-trade laws, in order that they may properly promote fair and constructive competition in the field of distribution.

* * * This measure in no way commits the Congress to a Federal policy concerning fair trade; nor does it make any provision which will require or burden any governmetal agency with the enforcement of this measure or any of the provisions of the State fair-trade acts; nor does this measure add any burdens to the Federal courts in the enforcement of these State laws.

H. R. 5767 is no more than a Federal enabling act to accommodate the States to carry out an adopted policy which was repeatedly declared to be constitutional and to be an appropriate means in an effort to regulate fair methods of competition in the field of distribution, as far as it may concern interstate transactions.

This measure is a constitutional prerogative of the Congress to promote and encourage State rights in the regulation of their internal affairs for the advancement of their respective communities.

* * * * * *

Senator John J. Sparkman

* * * I would like to have permission to put in the record that part of the Annual Report of the Select Committee on Small Business of the Senate dated January 21, 1952, that deals with fair trade laws. It will be found at page 213, continuing through page 226.

I think the above represents a fairly objective study of the problem of fair trade legislation.

Our interest in the fair trade laws was drawn into this thing at about the time the price wars took place during last year, the Macy price wars.

* * * It is not the imposition of Federal legislation upon a state or a community or a people. It is a recognition by the Federal Government of statutes which legislatures of various States have already enacted into law.

I am a great believer * * * in States Rights * * * it seems to me that this is the very essence of States Rights legislation. If fair trade laws are wrong, the wrong has been committed when the Federal Government takes notice of the fact that those States have, through the action of their own legislatures, put the laws on the book.

* * * * * *

APPENDIX G

THE STATE FAIR TRADE ACTS AND SUPPORTING FEDERAL LEGISLATION

Date of Original Enactment or Approval		
May 8, 1931	California,	L., 1931, Ch. 278; Business and Professions Code, Ch. 3, Part 2, div. 7, secs. 16900-16905.
March 9, 1933	Oregon,	L., 1933, Ch. 311; Comp. L., secs. 43-401 to 43-405.
March 12, 1935	New Jersey,	L., 1935, Ch. 58; Rev. Stat. 1937, Title 56, Ch. 4, Art. 2.
March 25, 1935	Washington,	L., 1935, Ch. 177; Rev. Code of 1951, Title 19, Ch. 19.88.
May 1, 1935	Wisconsin,	L., 1935, Ch. 52; Stat., 1949, sec. 133.25.
May 16, 1935	Iowa,	L., 1935, Ch. 106; Code, 1950, Title XXIII, Ch. 550.
May 17, 1935	Maryland,	L., 1935, Ch. 212, secs. 105-109; Code, 1951, Art. 83, secs. 102-110.
May 17, 1935	New York,	L., 1935, Ch. 976; L., 1940, Ch. 195, sec. 369.
June 5, 1935	Pennsylvania,	Acts of 1935, Act 115.
July 8, 1935	Illinois,	L., 1935, p. 1436; Smith-Hurd, Rev. Stat., 1935, Ch. 121½, sec. 188 et seq.
March 27, 1936	Virginia,	L., 1936, Ch. 321; Code of 1950, Title 59, Ch. 1.
April 7, 1936	Ohio,	House Bill 609 of 1936, First Special Session; General Code, secs. 6402-2 to 6402-9.
May 5, 1936	Rhode Island,	L., 1936, Ch. 2427.
June 26, 1936	Louisiana,	Act No. 13 of 1936; Rev. Stat. of 1950, Title 51, Part VIII, sub-part C, secs. 391-396.

Nov. 28, 1936	Arizona,	First Special Session of 1936, Ch. 11; Code 1939, Ch. 74, Art. 2, secs. 201-206.
Jan. 18, 1937	Kentucky	Acts, Fourth Special Session, 1936-937, Ch. 24; Rev. Stat., 1948, secs. 365.080 and 365.090.
Feb. 16, 1937	Tennessee,	Public Acts of 1937, Ch. 58.
Feb. 17, 1937	Arkansas,	Acts of 1937, No. 92; 6 Ark. Stat., 1947, secs. 70-201 through 70-208.
Feb. 18, 1937	Wyoming,	L., 1937, Ch. 58; Comp. Stat., 1945, Art. 3, Secs. 39-301 through 39-310.
Feb. 23, 1937	Indiana,	L., 1937, Ch. 17.
Feb. 23, 1937	Montana,	L., 1937, Ch. 42; Rev. Code, 1947, Title 85, Ch. 2.
Feb. 27, 1937	West Virginia,	Acts of 1937, Ch. 123.
March 2, 1937	New Mexico,	L., 1937, Ch. 44; Stat., 1941, secs. 51-1105 through 51-1108.
March 4, 1937	Georgia,	L., 1937, Act No. 100; Code, 1933, Ann., sec. 106-407.
March 4, 1937	Kansas,	L., 1937, Ch. 165, sec. 10; Gen'l Stat., 1949, secs. 50-301 through 50-310.
March 8, 1937	Nevada,	L., 1937, Ch. 48.
March 15, 1937	Colorado,	L., 1937, Ch. 146, secs. 1-8.
March 15, 1937	North Dakota,	L., 1937, Ch. 126; Rev. Code of 1943, Ch. 51-11.
March 18, 1937	Idaho,	L., 1937, Ch. 240, sec. 10; 429; Code of 1947, secs. 48-301 through 48-309.
March 22, 1937	North Carolina,	Gen'l Stat., 1937, Ch. 350; Gen'l Stat., 1943, Ch. 66, Art. 10, secs. 51-57.
March 23, 1937	Utah,	L., 1937, Ch. 20; Code, 1943, Title 16A, Ch. 3.
March 30, 1937	Minnesota,	L., 1937, Ch. 117; Stat., 1949, secs. 325.01-325.14.
April 20, 1937	Maine,	Public L., 1937, Ch. 204, Rev. Stat., 8th Rev., Ch. 169, secs. 1-5.
April 23, 1937	Nebraska,	L., 1937, Ch. 136; Rev. Stat., 1943, Ch. 59, Art. 11.

April 23, 1937	South Carolina,	Acts of 1937, Act No. 206; Code of Law, 1942, sec. 6639.
April 28, 1937	Oklahoma,	L., 1937, Ch. 67, Art. 1, secs. 1-6; Stat., 1951, Title 78, secs. 41-45.
May 22, 1937	Michigan,	L., 1937, Act 50.[1]
May 28, 1937	Massachusetts,	L., 1937, Ch. 398; Gen'l Laws, Ch. 93, sec. 14.
June 3, 1937	South Dakota,	L., 1937, Ch. 126, sec. 7; Code of 1939, Ch. 54.04.
June 5, 1937	Florida,	L., 1937, Ch. 18395 (No. 689); L., 1949, Senate Bill No. 592.[2]
June 8, 1937	Connecticut,	L., 1937, Ch. 304; Gen'l Stat., Rev. of 1949, Title 48, Ch. 313, secs. 6708-6714.
August 10, 1937	New Hampshire,	Public Acts of 1937, Ch. 184; Rev. L., 1942, Ch. 203.
August 17, 1937	*The Miller-Tydings Act,*	50 Stat. 673, 15 U. S. C. 1.
April 7, 1938	Mississippi,	L., 1938, Ch. 348; 1942 Code, Ann., Ch. 4, Title 8, Vol. 1, sec. 1108
Feb. 17, 1939	Alabama,	Gen'l Acts for 1939, No. 35; Code, 1940, Ch. 2, Title 57, secs. 77-83.
April 22, 1941	Delaware,	Acts of 1941, Ch. 201.
July 14, 1952	*The McGuire Act,*	66 Stat. 632, 15 U. S. C. sec. 45.

[1] Held invalid, under the State Constitution, as applied to non-signers. *Shakespeare Co.* v. *Lippman's,* 334 Mich. 109; 54 N. W. (2d) 268 (1952).

[2] Approved June 1, 1949; enacted to meet constitutional objections under the decision of The Florida Supreme Court in *Liquor Store* v. *Continental Dist. Corp.,* 40 So. (2d) 371 (1949).

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FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 166

ONEIDA LTD.,
Petitioner,

v.

GRAYSON-ROBINSON STORES, INC.,
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA AND BRIEF IN SUPPORT THEREOF

WALLACE H. MARTIN,
WALTER J. HALLIDAY,
ROBERT B. TROUTMAN,
JAMES M. SIBLEY,
Counsel for Petitioner.

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Petitioner respectfully requests permission to call the Court's attention to the following two decisions, published since the filing of the petition and brief though not yet officially reported. These decisions would have been included in a reply if respondent had filed an opposing brief.

1. *Calvert Distillers* v. *Rabilio,* Tennessee Supreme Court, handed down July 17, 1953 (printed as Appendix A, p. 3, infra), where in the concluding paragraph of the opinion, the need to have the McGuire Act passed on is noted, and where the Court says:

> "Whether or not the McGuire Act does as alleged in the bill in the instant case is really a Federal question on which decisions of the Federal Supreme Court must be followed by the Courts of this State."

2. *Schwegmann* v. *Eli Lilly,* United States Court of Appeals for the Fifth Circuit, handed down June 30, 1953 (printed as Appendix B, p. 8, infra), affirming a decision by the District Court for the Eastern District of Louisiana which is cited in the petition (p. 10) and also in the brief (p. 21).

Dated, September 29, 1953.

Respectfully submitted,

WALLACE H. MARTIN,
WALTER J. HALLIDAY,
ROBERT B. TROUTMAN,
JAMES M. SIBLEY,
Counsel for Petitioner.

APPENDIX A

(Reprinted from CCH Trade Reg. Rep., 1953 Trade Cases, Par. 67,540.)

[¶ 67,540] *Calvert Distillers Corporation* v. *Frank P. Robilio, Sidney Driger, and E. J. Belisomo.*

In the Tennessee Supreme Court, Dated July 17, 1953. Shelby Equity. Hon. L. D. Bejach, Chancellor.

OPINION

[*Fair Trade Injunction Denied*]

HAMILTON S. BURNETT, Justice [*In full text*]: The original bill in this cause was filed against seven defendants seeking an injunction against them for violation of the Fair Trade Act of Tennessee and specifically Section One and One-half thereof of Chapter 58 of the Public Acts of 1937. This Court in its majority opinion in the case of *Frankfort Distillers* v. *Liberto* [1950-1951 TRADE CASES ¶ 62,654], 190 Tenn. 478, 230 S. W. (2d) 971, held the Act in question constitutional. Four of the defendants in the instant bill filed answers. Judgment *pro confesso* was taken against the other three defendants who are the appellees here.

After the judgment *pro confesso* was taken counsel for the appellant presented to the Chancellor a decree in which he sought a permanent injunction against these three parties for violating the Fair Trade Act in that it was alleged in the bill that these three parties were selling the whiskies of the appellant below the agreed price that the appellant had with the distributors in Tennessee to whom it sold its products. The Chancellor refused to grant the injunction and since this was the only relief sought dismissed the bill. The appellant seasonably perfected its appeal. The only question presented to us is whether or not the

refusal to grant an injunction under the circumstances is an abuse of the discretion vested in the Chancellor.

The Chancellor delivered a long memorandum opinion which is in the record. Among other things he says that:

> "from time immemorial injunctions have been issued to prevent wrongs and not to assist in the perpetration of a wrong; and it is the deliberate considered opinion of this Court that if an injunction in this cause were granted it would assist in perpetrating a grievous wrong."

As to just why the refusal to issue an injunction would constitute a grievous wrong the Chancellor is not very definite. We though assume that there are many reasons in his mind back of why he made such a statement. Whether we as judges agree with the effect of an act of the Legislature is not the question. If the Act is constitutional and there is a violation thereof it is our duty as judges on the court to enforce the act. The meaning and intent of the Fair Trade Act certainly does not meet with the approval of the writer of this opinion but as before said that is neither here nor there. The Legislature which passed the Act have that on their shoulders and so long as it is constitutional and there is a violation thereof it is our duty as constituting the courts of the State to enforce the terms of the Act.

[*Effect of Schwegmann Case*]

As heretofore said this Court in *Frankfort Distillers Corporation* v. *Liberto, supra,* held the Fair Trade Act constitutional. Subsequent to our opinion so holding the Supreme Court of the United States in *Schwegmann Brothers* v. *Calvert Distillers Corporation* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, 95 L. ed. 1035, 71 S. Ct. 745, held that a similar act, in almost identical words of the State of Louisiana was enforcible in Louisiana against a retailer who refused to agree to the price fixing scheme and sold products of the distributors at a cut-rate price when

such distributor had not signed an agreement or contract to abide by the prices as fixed by the distilling company. The Supreme Court of the United States in this case held that the Louisiana act was violative of the Sherman Anti-trust Act, Sections 1-8, as amended, 15 U. S. C. A. Sections 1-7, 15.

[*Effect of McGuire Act*]

Subsequent to this decision Congress is alleged to have passed what is known as the McGuire Act which according to the allegations of the bill in this case remedied the situation so that acts of the kind, that is, price fixing acts by distillers and others as attempted to be enforced herein could be enforced in the States under the Sherman Anti-trust Act, *supra*.

Following the decision of this Court in the *Frankfort* case, *supra,* the Chancery Court at Memphis issued injunctions in that case. Following the holding of the Supreme Court of the United States in the *Schwegmann Brothers* case, those injunctions were dissolved. Then following the enactment of the McGuire Act the present litigation was begun.

As indicated at the outset this appeal is by the Distilling Company against three of the seven defendants who did not answer below but permitted a *pro confesso* to be taken against them. The case is still pending in the Chancery Court as to the other four defendants who answered. The reason that counsel appeared as *amicus curiae* herein was in an effort to protect the rights of the four defendants whom they represented in the Chancery Court. Among other things that these four defendants, who are still in court, allege in their answer is that

> "Defendants, however, allege that the McGuire Act did not attempt to sanction or legalize horizontal price fixing, and they further allege that the effect of the so-called Fair Trade Agreements executed by complainant with the retailers mentioned in the bill and similar

agreements made by other non-resident distillers with the same retailers and other retail liquor dealers of Shelby County, Tennessee, is to establish fixed prices on the horizontal level, and thus to create monopolies in violation of the State and Federal Anti-Trust Statutes."

[*Reason for Affirmance*]

It will thus be seen that the McGuire Act has never been passed on by any court insofar as we can find or have been advised. From the quotation, from the answer of the defendants now in court above, it is likewise seen that the question of the applicability of the McGuire Act to the present Fair Trade Act of this State is questioned. This being true we think that the Chancellor, for this reason if for no other, was justified in denying an injunction against these three defendants. He might determine upon the hearing in the case in which the four defendants are still in court that the McGuire Act did not change the situation since the holding of the Supreme Court of the United States in the *Schwegmann Brothers* case and that if this were true then of course our Act would not be unenforcible. The Chancellor was clearly right on this ground in denying the injunction against these three parties until this question is properly determined. If he had granted the injunction against these parties prior to this determination it is perfectly reasonable and possible that these parties would have suffered a very grave injury and wrong and would have had no recourse against this non-resident appellant. So for this reason alone, if for no other, we must affirm the action of the Chancellor.

[*Schwegmann Case Noted*]

It is interesting to note that in the *Schwegmann Brothers* case the Court there, among other things, said:

"It should be noted in this connection that the Miller-Tydings Act expressly continues the prohibitions of

the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level. Therefore, when a State compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. See *Parker* v. *Brown,* 317 U. S. 341, 350, 63 S. Ct. 307, 313, 87 L. ed. 315. Elimination of price competition at the retail level may, of course, lawfully result if a distributor successfully negotiates individual 'vertical' agreements with all his retailers. But when retailers are forced to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids 'horizontal' price fixing. A real sanction can be given the prohibitions of the proviso only if the price maintenance power granted a distributor is limited to voluntary engagements. Otherwise, the exception swallows the proviso and destroys its practical effectiveness.

"The contrary conclusion would have a vast and devastating effect on Sherman Act policies. If it were adopted, once a distributor executed a contract with a single retailer setting the minimum resale price for a commodity in the State, all other retailers could be forced into line. Had Congress desired to eliminate the consensual element from the arrangement and to permit blanketing a State with resale price fixing if only one retailer wanted it, we feel that different measures would have been adopted—either a nonsigner provision would have been included or resale price fixing would have been authorized without more. Certainly the words used connote a voluntary scheme. Contracts or agreements convey the idea of a cooperative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price fixing."

We feel that until the McGuire Act is passed on, preferably by the Federal Courts, holding that the Fair Trade Act provisions are eliminated from the brakes put on such things by the Sherman Antitrust Act *supra,* that the Chancellor was well within his discretion in denying an injunction in the instant case. Whether or not the McGuire Act does as alleged in the bill in the instant case is really

a Federal question on which decisions of the Federal Supreme Court must be followed by the Courts of this State. For the reasons above stated the opinion below will be affirmed.

APPENDIX B

(Reprinted from CCH Trade Reg. Rep., 1953 Trade Cases, Par. 67,516.)

[¶ 67,516] *Schwegmann Brothers Giant Super Market, et al.* v. *Eli Lilly & Company.*

In the United States Court of Appeals for the Fifth Circuit. No. 14440. Dated June 30, 1953.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before HOLMES, STRUM and RIVES, Circuit Judges.

[*Constitutionality of State and Federal Acts*]

RIVES, Circuit Judge [*In full text*]: The District Court delivered an able opinion [1] and enjoined the appellants from selling products of the appellee below the minimum retail sale price fixed pursuant to the Louisiana Fair Trade Law.[2] The essential facts are not in dispute. The appel-

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[1] *Eli Lilly & Company* v. *Schwegmann Brothers Giant Super Markets* [1953 TRADE CASES ¶ 67,409], 109 F. Supp. 269.

[2] Louisiana Revised Statutes of 1950, Title 51, Secs. 391 to 396. The original Act bore the following title:

"An Act to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade mark, brand or name."

The law provides in substance that no contract relating to the sale of a commodity which bears the trade mark, brand or name of the producer and which is in fair and open competition with commodities of the same general class produced by others shall violate any law of Louisiana by reason of containing a provision that the commodity shall not be resold at less than the minimum price stipulated

lants concede that the appellee's fair trade prices had been established by contracts entered into in accordance with the Louisiana Fair Trade Law; that appellee's products were in fair and open competition with commodities of the same general class produced by others; and that the appellants, themselves not signers of such a contract, willfully and knowingly disregarded the minimum prices established under contracts between the appellee and other Louisiana retailers. It was established also that the appellants had a uniform mark-up, employed no loss leaders, and indulged in no otherwise predatory practices. The appellants planted their defense squarely upon a challenge to the constitutionality of the Louisiana Fair Trade Law and a further challenge to the constitutionality of the McGuire Act.[3]

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under such contract. It further provides that willfully and knowingly selling such a commodity at less than minimum price, whether the person so selling is or is not a party to such a contract, is unfair competition and actionable by any person damaged.

[3] Act of July 14, 1952, 82nd Congress, 2nd Session, 66 Statutes 631, 632, 15 U. S. C. A. 45, Pocket Supplement. The purpose of the McGuire Act was stated as follows:

"It is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

According to its sponsor, Representative McGuire:

"The McGuire bill is merely permissive. It says to the States, in effect, that Congress recognizes the rights of the States to enact and make effective policies respecting unfair competition. That is all the McGuire bill does and that is all it is intended to do." 98 Cong. Rec. 4979 (May 7, 1952).

The primary purpose of the McGuire Act was to change, as to future cases, the result reached by the Supreme Court in *Schwegmann Brothers* v. *Calvert Distilleries Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, (referred to hereafter as the *Schwegmann* case) (H. R. Rep. 1437, 82nd Congress, 2nd Session, pp. 1-2).

The Louisiana Supreme Court has sustained the validity of the Louisiana Fair Trade Law, and its decision is conclusive, insofar as the State constitution is concerned. *Pepsodent Co.* v. *Krauss Co.*, 200 La. 959, 9 So. 2d. 303. The appellants contend that the State or Federal act or both together amount to an unconstitutional delegation of a legislative function, violate the due process clause, offend the commerce clause, and stem from self-defeating statutory provisions.

[*Louisiana Fair Trade Act*]

As to the Louisiana Fair Trade Law, the appellants say that it violates the due process clause of the Fourteenth Amendment to the United States Constitution, because it bears no substantial relation to the public welfare, and because it delegates legislative power to private individuals. The same contentions with respect to the Fair Trade Act of Illinois were considered and rejected by the United States Supreme Court in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183, (hereafter referred to as the *Old Dearborn* case); and the same result was reached in *Pep Boys* v. *Pyroil Sales Co.*, 299 U. S. 198, as to the California Fair Trade Act. Appellants' grounds for questioning that the *Old Dearborn* case controls here seem to be an assertion supported by various economic texts that the years of experience in the fair trade acts since *Old Dearborn* have established that the real purpose of these Acts is not so much to protect the good will of the manufacturer or trade mark owner as it is to protect the retailer from competition with other retailers, and, further, that the opinion in the *Schwegmann* case (Footnote 3, *supra*) has rendered *Old Dearborn* obsolete.

[*Prior Schwegmann Case Not Applicable*]

The *Schwegmann* opinion involved no constitutional question and, hence, did not refer to *Old Dearborn*. The *Schwegmann* case related to the interpretation of the Sher-

man Antitrust Act as amended by the Miller-Tydings Act (Act of July 2, 1890, c. 647, Sec. 1, 26 Stat. 209; Act of Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. Sec. 1) with respect to the enforcement of state fair trade laws in interstate commerce. The Court decided that the intention of Congress was to authorize interstate enforcement against the signers of an express contract or agreement but not against nonsigners. To meet that decision, as has been said, Congress passed the McGuire Act.

The appellants rely strongly upon the claimed inconsistency in language between the *Old Dearborn* and *Schwegmann* opinions. The *Schwegmann* case referred to nonsigners as being coerced, whereas *Old Dearborn* said that willful and knowing nonsigners could fairly be treated as implied assenters. The *Schwegmann* opinion characterized the State Fair Trade Statute as involving price fixing, whereas *Old Dearborn* has said that the law was not primarily a price fixing statute. In comparing the two opinions, it must be borne in mind that *Old Dearborn* was dealing with questions of constitutionality, whereas the *Schwegmann* case was dealing only with statutory interpretation. There is no implication in *Schwegmann* that Congressional approval of enforcement against non-signers would be unconsitutional, the implications of the opinion are to the contrary.[4]

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[4] "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, *absent approval by Congress.*" (341 U. S. at p. 386.)

"Had Congress desired to eliminate the consensual element from the arrangement and to permit blanketing a state with resale price fixing if only one retailer wanted it, we feel that different measures would have been adopted—*either a non-signer provision would have been included or resale price fixing would have been authorized without more.*" (341 U. S. at p. 390.)

"It should be remembered that it was the state laws that the federal law was designed to accommodate. Federal regulation was to give way to state regulation. When state regulation provided for resale price maintenance by both those who contracted and those who did not, and the federal regulation was relaxed only as respects 'contracts or agreements', the inference is strong that *Congress left the non-contracting group to be governed by preexisting law.*" (341 U. S. at p. 395.) (Italics in each quotation supplied.)

[*Economic and Social Aspects Not Considered*]

The trend of economic practices as tending to show that fair trade acts are concerned more with the protection of distributors than with the protection of the producer or owner of the trade mark are matters, it seems to us, for legislative, not for judicial, consideration. Indeed, the title of the Louisiana Fair Trade Law (Footnote 2, *supra*) expressly includes "distributors" among the classes intended to be protected. We cannot say that the legislature was not authorized to consider distributors as in a similar position to licensees of the trade mark or brand with a direct economic interest in it as regards the sales of the trade-marked or branded article. Whether the distributors were to be protected, as well as the manufacturers or trade mark owners, was a matter, it seems to us, addressed to legislative discretion and not subject to review by courts. We have no judicial concern with the economic and social wisdom of any feature of the law, but solely with its constitutionality.

Whatever weakening effect on *Old Dearborn* may have been caused by *Schwegmann's* frank characterization of State fair trade statutes as involving price fixing against non-signers is more than off-set, it seems to us, by the weakening also of the broad concept against the validity of legislative price fixing assumed in *Old Dearborn*. For "the well-settled general principle that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments" (299 U. S. at p. 192), *Old Dearborn* cited *Tyson & Brothers* v. *Banton*, 273 U. S. 418, 429; *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 537; *Ribnik* v. *McBride*, 277 U. S. 350; *Williams* v. *Standard Oil Co.*, 278 U. S. 235; *New State Ice Co.* v. *Liebmann*, 285 U. S. 262. As pointed out in *Olsen* v. *Nebraska*, 313 U. S. 236, 244-246, the *Tyson*, *Ribnik* and *Williams* cases can no longer be deemed controlling authority. See also, *Lincoln Union* v. *Northwestern*

Co., 335 U. S. 525, 536, 537; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423. It is interesting to note that Mr. Justice Sutherland who delivered the opinion of the Court in *Old Dearborn* had been among the dissenting Justices in *Nebbia* v. *New York*, 291 U. S. 502, where the Court concluded (at p. 539):

> "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

[*Act Authorizes Others to Fix Prices*]

Appellants argue that there is no provision in the Louisiana Fair Trade Law requiring that fair trade contracts be made by the trade mark or brand owner himself, and that fair trade laws could not constitutionally require non-signers to observe minimum prices stipulated without participation or authorization by the trade mark or brand owner. That argument is addressed to a hypothetical case and the decision of that question, we think, should await the clarification and construction of the Louisiana statute by the Louisiana courts. We are dealing in this case with fair trade prices established by contracts to which the trade mark owner, the appellee, is a party. See *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 462; *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 568; *et seq.; Watson* v. *Buck*, 313 U. S. 387, 401-402.

The Louisiana legislature has defined with particularity the type of commodity with respect to which fair trade prices may be established and enforced; namely, "a commodity which bears, or the label or container of which bears, the trade mark, brand or name of the producer of the commodity and which is in fair and open competition with commodities of the same general class produced by other." It was, we think, within the province of the

legislature to assume that economic laws constitute a sufficient restraint against capricious or arbitrary price fixing by the producer. As pointed out long ago by Louis D. (later Mr. Justice) Brandeis, the producer "establishes his price at his peril—the peril that if he sets it too high, either the consumer will not buy or, if the article is, nevertheless, popular, the high profits will invite even more competition".[5] We agree with the learned District Judge that *Old Dearborn* still controls and, further, that, if it is to be overruled, that can be done only by the Supreme Court.

[*McGuire Act*]

Old Dearborn, of course, did not consider the challenges which are addressed to the McGuire Act. The argument is that Article 1, Sec. 1, of the Constitution vests in Congress legislative power which cannot be delegated, and that Article 1, Sec. 8, grants to Congress powers over interstate commerce which cannot be surrendered. The McGuire Act did not delegate the power of Congress to say what fair trade legislation should be permitted in interstate commerce, but spelled out in detail the type of fair trade statute to which the Congressional consent was to apply by specifying the standards and safeguards which a state act must embody in order to qualify for interstate effectiveness. As to interstate commerce, it is now settled that the power of Congress is so plenary that it may exercise that power by permitting the states to regulate phases of interstate commerce. *Prudential Insurance Co.* v. *Benjamin,* 328 U. S. 408, 424. The most recent decision, *United States* v. *Public Utilities Comm'n,* 345 U. S. 295, 304, indicates that, even when the subject would be a direct burden on commerce, the states may act when Congress has specifically granted permission for the exercise of state power.

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[5] Brandeis, "Cut-Throat Prices—The Competition That Kills", *Harper's Weekly,* November 15, 1913.

[*Combination of Acts Valid*]

The appellants argue, however, that both the McGuire Act and the Louisiana Fair Trade Law are inoperative against non-signers, because they contain self-defeating contradictions in terms, that the maintenance of uniform resale prices, which results from the power of a producer to impose prices on non-contracting parties, is horizontal price fixing expressly excluded from the protection of those laws. Appellants' argument would render the statutes meaningless as to non-signers. The intention of Congress and the intention of the Louisiana Legislature are clearly that restrictions on the non-signers, when imposed as the result of a contract between a producer and a distributor, are to be given effect. What is prohibited is horizontal price fixing agreements "between manufacturers, or between producers, or between wholesalers, or between brokers or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." (The McGuire Act.) We find nothing in the Louisiana Fair Trade Law or in the McGuire Act self-defeating or violative of the Constitution of the United States. The judgment is, therefore, affirmed.

[Dissenting Opinion]

Holmes, Circuit Judge, dissenting:

[*Question Involved*]

The question presented on this appeal is as to the constitutionality of the Louisiana Fair Trade Law (51 La. R. S. 391-396) insofar as it imposes price-fixing agreements upon persons who are not parties to a fair-trade contract. The appellants contend that such so-called fair trade price-fixing under a federal law violates the Fifth Amendment, and under a state law violates the Fourteenth Amendment. The federal statutes here involved are the Federal Trade

Commission Act, as amended by the Act of July 14, 1952, 66 Stat. 631, 15 U. S. C. 45; and the Sherman Act, as amended by the Act of August 17, 1937, 50 Stat. 673, 693, 15 U. S. C. 1.

[*Improper Delegation of Legislative Power*]

The appellants contend that the Louisiana Fair Trade Act and the above-cited federal act of July 14, 1952, separately and as they relate to each other, constitute an improper delegation of legislative power to private individuals to fix prices without legal standards or governmental supervision. A diabetic, they say, pays $2.08 for a bottle of Lilly's insulin at Schwegmann's $2.83 for an identical bottle at so-called fair trade prices. There is no suggestion that the appellants are using the appellee's products as loss leaders, though they sell below the prices of identical commodities in the manufacturer's contract with other retail dealers. As well stated by the court below:

> "The defendants simply are efficient retailers who pass on the fruits of that efficiency to the buying public in the form of lower prices. Enforcement of the fair-trade act would protect other retailers from this type of competition."

[*State Regulation of Prices Limited*]

We are not necessarily concerned with the alleged unconstitutionality of any phase of the federal act, because a much narrower issue is presented to us with reference to the Louisiana statute, the determination of which might dispose of this case. The vulnerable part of the state statute is that provisions of Section 394, Title 51, which denounces as unfair competition and actionable, the sale of any identified commodity by a person not a party to the contract at less than the minimum contract price. The Congress may use its power over interstate commerce to support local policies of the states, but it cannot authorize

state regulation of commerce except by methods that are consistent with due process, that have a substantial relation to the public weal, and that are not arbitrary or capricious. The use of private property and the making of private contracts are generally free from governmental interference, but they are subject to public regulation when the public interest requires it. These limitations apply to the power of a state to regulate prices in commercial transactions between individuals.

[*Extent of Judgment Below*]

The appellants did not sign the contract that fixed the prices involved in this controversy, and they did not expressly or impliedly agree to the contents of that instrument; but the judgment under review restrains them from offering for sale or selling the commodities manufactured by appellee at less than the minimum prices stipulated in contracts entered into by appellee with other retailers, pursuant to the Louisiana Fair Trade Law, "or at prices less than those which may be shown in any future retail resale price schedules" issued by the appellee in connection with such contracts; and it further enjoins them from making any rebates, refunds, discounts or concessions of any kind or character for the purpose of, or which will result in, decreasing the said stipulated retail prices, save in four special cases not pertinent here. These prices may be raised or lowered by the appellee in contracts with other retailers, and the appellants must conform to any changes in prices that affect their merchandise. Not only that, the appellants must keep posted as to the retail resale minimum prices of all other commodities handled by them which bear, or the labels or containers of which bear, the trade mark, brand, or name of the appellee, and which are in fair and open competition with commodities of the same general class produced by others; and they must require an agreement from the second vendee that he will not, in turn, resell any such commodity at less than the minimum price stipulated by the vendor or by the vendee.

[*Early Decision on Constitutional Question*]

In *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, the court said, p. 191:

> "In respect of the due process of law clause, it is contended that the statute is a price-fixing law, which has the effect of denying to the owner of property the right to determine for himself the price at which he will sell. Appellants invoke the well-settled general principle that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments [citing authorities]. These cases hold that, with certain exceptions which need not be set forth, this right of the owner cannot be denied by legislative enactment fixing prices and compelling such owner to adhere to them. But the decisions referred to deal only with legislative price fixing. They constitute no authority for holding that prices in respect to identified goods may not be fixed under legislative leave by contract between the parties. The Illinois Fair Trade Act does not infringe the doctrine of these cases."

[*Effect of Prior Schwegmann Case*]

The above case and *Pep Boys* v. *Pyroil Sales Co.*, 299 U. S. 198, would require an affirmance of the lower court's decision in the instant case; but the later decision of *Schwegmann Bros.* v. *Calvert Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 384, has opened the door for a reconsideration of the constitutionality of fair trade laws as price fixing statutes. Assailing the constitutionality of the *Old Dearborn* case, the appellants contend that price-fixing imposed on non-signers under the Louisiana Fair Trade Law is invalid as to them, because the legislation prescribes no legal standards, is wholly coercive as to non-signers, and affords them no opportunity to be heard. They quote as follows from a later decision:

"If a distributor and one or more retailers want to agree, combine, or conspire to fix a minimum price, they can do so if the state law permits. . . . When they seek, however, to impose price-fixing on persons who have not contracted or agreed to the scheme, the situation is vastly different. That is not price-fixing by contract or agreement; that is price-fixing by compulsion. That is not following the path of consensual agreement; that is resort to coercion. . . . Contracts or agreements convey the idea of a cooperative arrangement, not a program whereby recalcitrants are dragged in by the heels and compelled to submit to price-fixing." *Schwegmann Bros.* v. *Calvert Corp.* [1950-1951 TRADE CASES ¶ 62,823], 341 U. S. 388 and 390.

[*Effect of Subsequent Federal Act*]

After the *Schwegmann* decision, *supra,* which dealt with the Louisiana Fair Trade act, the above-cited act of July 14, 1952, was passed. The latter is known as the Federal Fair Trade Act; and, if it did not drag the appellants in by the heels, it sought to remove them from the sanctuary of the Sherman anti-trust act. A non-signer provision was included and a provision whereby a state may be blanketed with resale price-fixing if only one retailer wants it, provided this feature of the Louisiana statute is constitutional. Nevertheless, we think it was not the intention of the federal statute to delegate to the states any power but merely to free commerce from some of the federal statutory restrictions that were mentioned in the *Schwegmann* case. The federal constitutional barriers remain. In *Dr. Miles Medical Co.* v. *Park and Sons Co.,* 220 U. S., pp. 405 and 409, Mr. Justice Hughes said:

"Whatever right the manufacturer may have to project his control beyond his own sales must depend, not upon an inherent power incident to production and original ownership, but upon agreement. . . . The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

[*Appellees Are Non-Signers*]

The reasoning of the *Old Dearborn* decision was predicated upon the assumption that non-signers had consented to the arrangement. Price-fixing between the parties by agreement is very simple to the extent that antitrust statutes are relaxed; but it would be a fabrication to assume that the Schwegmanns have consented to the prices fixed by the appellee. Mr. John Schwegmann testified:

> "When I went into the drug business the mark-up in that business was so high you wouldn't believe one man would over-charge his fellow-man that kind of a mark-up."

His testimony is that his mark-up is dependent on the cost of doing business, that he is making money in his drug department, and that all fair-trade articles are sold for less than fair-trade prices except the appellee's, upon which the court ordered him to raise the prices. He explained how he arrived at the cost of his merchandise (to which he added the profit he wanted to make), and he said:

> "We have done that every year since we have been in business, and I have made more money than I ever dreamed I could make."

He asked:

> "If I could do it, why couldn't the drug stores do it?"

[*Nationwide Consensual Horizontal Price-Fixing*]

The appellee is engaged in the manufacture, distribution, and sale of pharmaceutical products. There are more than a hundred other companies in this same field. Many of them manufacture products that are identical or equivalent to those of appellee. The latter makes almost one-thousand products in some seven thousand different pharmaceutical forms, and promotes their sale and distribution on a nation-wide scale. It spends millions annually for

this purpose, including advertisements. If the prices were fixed by it by consent on all of its trade-marked merchandise, and the same were done not only by all of the one-hundred other drug manufacturers but by all other makers of trade-marked articles in forty-five states having fair-trade laws, it is apparent that we would have not only consensual vertical but consensual horizontal price-fixing on a nation-wide scale except in three states.

[*Fair Trade Laws Subject to Constitutional Requirements*]

If the appellee may agree with a single retailer to fix minimum prices on innumerable branded commodities, a thousand other trade-mark owners may do the same thing. These prices may be changed at will by the parties without giving non-signers a hearing. Legal standards are still required for a state or federal governmental agency to fix prices, however eroded may be the maxim that a delegated authority cannot be delegated (*Delegata potestas non potest delegari*). *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 415 *et seq.* Fair trade laws, which have been given an exemption from anti-trust statutes to validate them, remain subject to constitutional requirements. Even joint state and federal action is limited by those provisions of the constitution that forbid action altogether. *Prudential Ins. Co.* v. *Benjamin,* 328 U. S. 408, 434.

[*Price-Fixing a Legislative Function*]

Price-fixing, like rate-making, is a legislative function, but no legislature has fixed any prices in this controversy. The federal legislature has taken its hands off of it, and left the states free to act. The Louisiana legislature has fixed no prices as to trade-marked commodities, but has authorized the vendors and vendees to do it. All of which was within the police power of the state; but when it dragged in every retailer, alive and kicking, that had notice

of the contract, the Louisiana law went too far. If it did not make each of the contracting parties a judge in his own case, it made the vendor and vendee of one commodity the arbiters of the property rights of every stranger to the contract who owned commodities of the same brand.

[*Purpose of Trade-Mark*]

The office of a trade-mark is to give notice of the identity of the producer of an article. It should be distinguished from a trade name, which is more properly allied with the good will of a business. In the *Old Dearborn* case, the court held, as to non-signers with notice, that the unfair competition consisted in their reselling, under the trade-mark of the producer, below the minimum of price contract to which they were not parties. The answer to this is that the manufacturer used his trade-mark to induce the original sale. He had his name and brand on the original package when he sold his product and put it into the channels of trade. If a non-signer should use that trade-marked container to sell some other product, he would be guilty of unfair competition, but if he sells the same product, in the same container, under the same name, that was used by the manufacturer, he breaches no contract, commits no fraud or deception, and practices no unfair competition, merely by taking a smaller profit than some other retailer was willing to accept. Such competition is not unfair; it is the life of trade; and to stifle trade in any commodity is to foster a monopoly, which the law abhors. *Sunbeam Corp.* v. *Wentling* [1950-1951 TRADE CASES ¶ 62,935], 192 F. (2) 7.

[*No Wrong Done by Appellants*]

It does not appear from whom the appellants acquired or may acquire the appellee's products, nor how the good will of the manufacturer's business was or will be injured by free competition among retailers. There is no proof

or presumption of wrongdoing on the part of the appellants. They have lowered prices in trade-marked commodities; this is the extent of their offending. To make it a *tort per se* for retail druggists and whiskey dealers to compete with each other openly and fairly in trade-marked commodities is fanciful and arbitrary; and to say that horizontal price-fixing contracts are unlawful but vertical price-fixing agreements are legal though monopolistic is to summarize the effect of the Louisiana law, the title to which is an attractive misnomer.

[*Protection of Good Will*]

As to forty-five states and several Congresses having complacently approved in principle the constitutionality of the fair-trade statutes, the answer is that it is true; they have done this *sub silentio;* but the constitutional reasoning of all of them is found in the *Old Dearborn* opinion. It is brief, and is no better or worse than it was when written in 1936. It holds that prices in respect of trade-marked goods may be fixed by contract between the parties. It adopts a rule that was "upset . . . in a series of cases of which *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, is an example." It tacitly admits that if any state legislature or any delegated state agency should fix prices as these contracting parties have done, the right of the owner to fix his own prices would be violated; but, it says, this "constitutes no authority for holding that prices in respect of identified goods may not be fixed under legislative leave by contract between the parties." When it comes to non-signers, the opinion confuses the use of a brand or trade-mark with the good will of a business. It proceeds upon the theory that the sale of identified goods at less than the prices fixed by the owner of the mark or brand is an assault upon the good will of the manufacturer's business. If that premise is false, the whole structure of fair-trade statutes tumbles like a house of cards. If a satisfied customer is the best advertisement, and good will

is the disposition of a pleased customer to return to the place where he has been well treated, which are almost aphorisms, then sales below the minimum contract prices will enhance the good will not only of the retailer but of the producer of trade-marked commodities. If water runs down hill and the property of fire is to burn, monopolistic prices injure good-will and cause resentment in the hearts of the people who are oppressed by them. They feel like those of old who were required to make brick without straw. The average man or house-wife will find no comfort in the fact that the prices of food or drugs are kept high by vertical rather than horizontal agreements.

[*Old Dearborn Case Discussed*]

Trade-mark and good-will are not synonymous terms; but the *Old Dearborn* opinion says: "Appellants own the commodity; they do not own the mark or good will that the mark symbolizes." The court ignored the fact that the producer put its name and mark on the container (sometimes on the product) and launched it in commerce. The court said that there was nothing to prevent a purchaser from selling the commodity alone at any price, and nothing to preclude a purchaser from removing the mark or brand and then selling the commodity at his own price, with a vague proviso that the good will of the producer must not be used to aid the sale. This proviso must be distinguished from the three statutory conditions wherein sales are excepted from minimum price agreements. The statutory exceptions are not involved here, and the *Old Dearborn* opinion maintains that the retailer may separate the physical property, which he owns, from the good will of the manufacturer's business, which is the property of another, and then sell the commodity at his own price, provided, etc. The court says ownership of the good will "remains unchanged notwithstanding the commodity has been parted with"; and then it says that the fair-trade statute interferes "only to protect the good will against

injury." Let us now ascertain what physical property was sold by the appellee, and what incorporeal property was retained by it.

[*What Appellants Bought*]

The appellants bought more than the loose, disattached, commodity; they bought the package, bottle, or container, in which it was delivered, with the inscriptions on the same. This tangible property was put into the channels of trade by the producer, and title to it passed to the retailers; but the latter acquired nothing intangible, like the good will of the vendor's business, or the right to use the trade mark on other commodities sold by them. No covenants ran with the sale of the merchandise like covenants sometimes run with the land conveyed. The doctrine of *caveat emptor* did not require the buyers to beware of price-fixing agreements between the vendor and some other retailer. If the appellants made no contract, they did not need to underwrite the covenants of their competitors. A trade mark is not always evidence of good quality or symbolic of good will; but ordinarily is only representative of the origin of a commodity or the identity of its maker. Marks that simply indicate the quality of articles do not constitute a valid trade mark, and no property may be acquired therein.

[*No Unfair Competition*]

We have here sales, for the purpose of resale, of commodities in trade-marked containers; and it was not unfair competition, injurious to the producer's good will, for retailers who had agreed to no prices to resell the same commodities in the same containers at their own prices without defacing the trade mark. Without mentioning the practical impossibility of removing the trade mark from all aspirin tablets and from all the containers of drugs in stock, there are state and federal statutes forbidding the obliteration or concealment of trade marks, and even requiring the display of the manufacturer's, packer's, or distributor's name

on drugs. 27 U. S. C. 205(e); 21 U. S. C. 331, 352. 21 U. S. C. 352(a) says: "A drug shall be deemed misbranded if its labeling is false or misleading in any particular," . . . or 352(1)(3) "if it is offered for sale under the name of another drug."

[*Right of Non-Signer To Sell at Own Price*]

A *sine-qua-non* of the constitutionality of the Louisiana fair-trade law is the right of a non-signer to remove the trade mark of the manufacturer and sell the commodity at his own price. If that right is unduly restricted by law or by impractical factual conditions, it may fairly be regarded as non-existent, both of which postulates are true in the instant case. To hold otherwise with reference to the trade mark on every aspirin tablet would give the husks of justice to the retailer and minimum price control to the manufacturer. Whiskey was the product involved in *Old Dearborn,* the defacing of the trade mark on which is now prohibited by state and federal laws. The same is true as to some drugs involved in this case and covered by the injunction. It is a legal, factual, and economic impossibility for the owner of tangible personal property to part completely with the possession thereof and the title thereto, and yet retain control of the price thereof in perpetuity. The effort of dead hands to control the disposition of real estate was thwarted at common law by the rule against perpetuities; and the effort of living hands, or corporate hands that never die, to control the price of commodities in the hands of remote purchasers should suffer a similar fate. If distillers and drug manufacturers may make consensual vertical price fixing agreements with retailers that are binding on non-signers, there are plenty of trade-marked breakfast foods, canned goods, and other edible commodities, the producers of which might blanket the nation with vertical minimum-price-fixing agreements. What a tangled web this would be! Cf. La. R. S. 40: 608; 40: 617; 40: 622; 40: 627; 51: 242; 51: 243; 51: 522.

[*Louisiana Law Void Where Coercive*]

With the antitrust statutes out of the way, there is no unlawful delegation of price-fixing authority under the Louisiana fair-trade statute so long as it is consensual; but, to the extent that it is coercive, it is lacking in due process, confiscatory, and void. Being entirely coercive as to the appellants, the judgment appealed from should be reversed; otherwise the original Sherman Act may be whittled away by legislative exemptions and exceptions, administrative orders and processes, trademark devices, patent rights, judicial decisions, and consensual price-fixing under brigaded state and federal legislation. Therefore, I respectfully dissent.